United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF ON BEHALF OF AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO AND FOOD HANDLERS LOCAL 425

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22393

AMALGAMATED MEAT CUTTERS AND
BUTCHER WORKMEN OF NORTH AMERICA,
AFL-CIO, AND FOOD HANDLERS LOCAL 425,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION TO REVIEW AND SET ASIDE AN
ORDER OF THE NATIONAL LABOR RELATIONS BOARD

United States Court of Appeals
for the District of Columbia Circuit

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Local 282, International Brotherhood of Teamsters v. N.L.R.B., 339 F. 2d 795 (C.A. 2, 1964) 25

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N.L.R.B. v. Andrew Jergens Co., 175 F. 2d 130 (C.A. 9, 1949) cert. denied 338 U.S. 827, 70 S. Ct. 76 53

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*N.L.R.B. v. Truitt Mfg. Co., 351 U.S. 149, 76 S. Ct. 753 (1956) 28, 32, 50

N.L.R.B. v. United Nuclear Corporation, 381 F. 2d 972 (C.A. 10, 1967) 30, 43, 54

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United Steelworkers of America v. N.L.R.B. (Luxaire, Inc.), 393 F. 2d 661 (C.A.D.C., 1968) 25

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO AND FOOD HANDLERS LOCAL 425,	)	
Petitioners,	)	
v.	)	No. 22393
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent.	)	

ON PETITION TO REVIEW AND SET ASIDE AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

ISSUES PRESENTED FOR REVIEW

The questions presented, as formulated in the prehearing conference stipulation (A. 315) 1 / are as follows:

1. Whether the Board erred in refusing to admit evidence offered by Charging Parties.

2. Whether the Board erred in failing to find that the Company violated Section 8(a)(1), (3) and (5) of the Act.

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1 / "A" refers to portions of the record which were reproduced and designated as Appendix of the Parties. References preceding a semicolon are to the Board's or Trial Examiner's findings. Those following the semicolon are to the supporting evidence.

In accordance with Rule 8(d) of the General Rules of this Court, the Petitioners state that this case has not previously been before the Court.

STATEMENT OF THE CASE

This matter comes before the Court upon the petition of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, and Food Handlers Local 425 [2] / to review and set aside an order of the National Labor Relations Board (hereinafter referred to as "Board") issued on September 10, 1968 pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, et seq.). The Board's decision and order are reported at 172 NLRB No. 224. The Court has jurisdiction of the proceedings under Section 10(f) of the Act.

I. The Proceedings Before the Trial Examiner and the Board.

The complaint alleged that Tysons [3] / violated Section 8(a)(1), (3) and (5) of the Act by granting wage increases to its employees on June 6, 1966 [4] / ". . .without notification to, or bargaining with the Union, and also in order to undermine the Union and to encourage their employees to decertify the Union as

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2 / Hereinafter referred to collectively as the Union. Where it is necessary to distinguish between petitioners reference shall be made to either "International Union" or "Local Union".

3 / The name of the employer before the Board, Tyson's Foods, Inc. and Tyson's Poultry Company shall be referred to herein as "Tysons" or "Company".

4 / All dates hereinafter shall refer to the year 1966 unless otherwise indicated.

their collective bargaining representative" (A. 342, ¶ 14). Also, paragraph 15 of the complaint alleged:

> Commencing on about June 6, 1966, and at all times thereafter [the Company] negotiated with the Union in bad faith and with no intention of entering into any final or binding collective bargaining agreement.
> (A. 342, ¶ 15)

The Trial Examiner found that the International Union's Vice-President Rose gave his assent to the institution of the base rate increase of June 6 and therefore that increase was not unilaterally instituted or in bad faith (A. 330). However, the Trial Examiner found that the Company also put into effect wage increases for premium jobs of which it had not given notice to the Union or afforded the Union an opportunity to bargain, and therefore unilaterally instituted premium rates in the violation of Section 8(a)(5) and (1) of the Act. The Trial Examiner further found that the Company failed to provide wage information requested by the Union with respect to all job classifications including premium classifications, that the timing of the wage increase was consciously in conjunction with a decertification movement and that Tysons' conduct was "a deliberate effort on the part of the Company to discredit the Union in the eyes of the employees and to give encouragement and support to the movement to secure the revocation of the Union's bargaining authority". (A. 331-332)

The Trial Examiner refused to admit most of the evidence offered by the Union, the charging party herein, including all evidence of events following June 6, as alleged in paragraph 15 of the complaint, and predicated his ruling upon the General Counsel's assertion that paragraph 15 "...is not an evidentiary paragraph.

It is a legal conclusion..." (A. 326; 75).

The Board agreed with all the findings and conclusions of the Trial Examiner except for his finding of a violation with respect to the institution of premium rates (A. 318-319). The Board held that premium rates were not litigated and even assuming that the facts concerning their institution were litigated, the premium rate was an adjustment in the base rate of premium employees (A. 319). The Board did not rule upon its Trial Examiner's findings that the Company's conduct was in conjunction with the decertification movement, that it was intended to discredit the Union, and that the Company refused to supply requested wage information, except to state that it could find nothing in the record to justify those findings (A. 318, fn. 5).

The Trial Examiner, as sustained by the Board (A. 319, fn. 7; 326-327) excluded a great deal of evidence offered by the Union. As a general proposition, the evidence admitted into the record consists only of (1) the bargaining sessions between the parties from April 26 to the alleged and found meeting of June 6 and then only as much of those meetings that deal with the wage proposals, (2) the Union's request and partial receipt of inconsistent wage information and, (3) the fact that there was a decertification petition and the Company's knowledge thereof. The evidence which the Union attempted to introduce, which is in the record as an offer of proof, consists of the parties total dealings with each other from the first election which ultimately resulted in the Union's certification, the entire bargaining sessions and the last communications between the parties, particularly the events following June 6.

II. Chronology of Events

For the purposes of clarity and continuity all the evidence in the record including that which is contained therein as offers of proof, will be set forth hereinafter in chronological order. Where essential, we shall designate that particular facts were admitted into evidence.

A. Certification of the Union.

The Union filed its petition for certification on July 24, 1964 and an election was held on October 16, 1964 resulting in the Union's failure to receive a majority (A. 401, fn. 1). The Union filed objections to the Company's pre-election conduct and upon a hearing, reviewed by the Board, it was determined that the Company's conduct affected the results of the election. On April 9, 1965 a second election was ordered (A. 415-416). On May 6, 1965 a majority of Tyson's employees, voting in a secret ballot election, selected the Union as their bargaining representative and on May 14, 1965 the Union was so certified (A. 341, ¶ 9, admitted by the Company, A. 348, ¶ VI).

B. Negotiations Between the Parties From the Date of Certification to June 6.

Shortly after the Union gained its certification the parties began negotiating (A. 116). At the outset of negotiations and continuing until the end of the certification year, as will be detailed throughout this Statement of Facts, Bob Parker, Secretary-Treasurer of the Local Union, requested Company information with respect to premium rates, the number of employees on jobs, the meaning of grade classifications and general wage information (A. 134-135). Parker's testimony is undisputed and the Trial Examiner found that he received no information pursuant to his requests until after May 17 and then only a part of what was

requested which conflicted with earlier Company proposals. (A. 331; 136-137, 142-143, 151-152, 387-388). All evidence with respect to the requests and receipt of wage information was received into the record.

The Company's first written proposal was submitted to the Union on November 3, 1965, some five months after negotiations began. Said proposal contained nothing more than the same wages, hours, terms and conditions of employment that were then in effect at the plant (A. 116-117, 362-374). The Company's wage proposal was stated in terms of "Starting rate, Grade 1 jobs and Grade 2 jobs" (A. 373). The parties met again on March 15 at which time the Company proposed a wage of $1.25 for starting rate, $1.37 for Grade 1and $1.40 for Grade 2 jobs. The Union's proposal was for a $1.46 5 / (A. 117, 386).

On April 6 Parker wrote to Company Personnel Manager Knight stating that because Tysons had proposed wage rates according to Grades 1 and 2 the Union wanted a list of all employees, their grades and "...the elements, conditions, requirements, duties and/or functions of employees for each job classification ..." (A. 138, 387).

The next meeting between the parties was on April 26 at the International Union's headquarters. In attendance for the Union were: T. J. Lloyd and

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5 / Not having the requested wage information until after May 17, the Union did not know the difference between the various grades and accompanying rates proposed by the Company (A. 134). The Trial Examiner received this evidence.

Jasper Rose, President and Vice-President respectively of the International Union, Parker and Carl Nothnagel, an official of another local union affiliated with the International Union (A. 44,80). In attendance for Tysons was Don Tyson, at that time Vice-President and now President of Tysons (A. 8, 44). At this meeting the Union submitted an entire contract proposal (A. 79, 374-386) and Tyson took some time to study it (A. 80). Lloyd proposed that Tyson could have his choice, the best or the worst, of any one of five Union poultry contracts then existing in the State of Arkansas (A. 80-81).

With respect to the wage issue, the Union proposed as a three-year package a base rate of $1.46 with increases for the second and third year of the agreement (A. 44). Tyson proposed a base rate of $1.41 as of May, $1.44 in February, 1967 and subsequent increments of $1.63 and $1.67 (A. 45). The Union proposed that there be twelve premium jobs; and the Company offered six premium jobs (A. 85). With respect to non-wage items Tyson stated he could agree to the Union's "complete agreement" clause (A. 82) and the subcontracting clause because he had no intention of subcontracting (A. 83), and the clause with respect to working supervisors (A. 83-84), however Tyson wanted his attorney, James Gilker, to check these clauses only for contract language (A. 82, 84). The parties worked into the late evening of April 26 and according to Rose's calculations on economic matters they were less than one cent apart from reaching a total agreement (A. 84).

The next meeting was held in Kansas City on May 5. The same individuals were present and in addition the Company's plant manager, Buddy Wray, joined Tyson (A. 46). On the wage issue the Company proposed a base rate of $1.41

per hour, followed by $1.44 in February, 1967 and subsequent increments of $1.52 and $1.68 (A. 46). The Union proposed a base rate of $1.41 provided that it be increased $1.46 on September 1, and various increments thereafter (A. 47). It was understood that the wage proposals offered on May 5 and earlier were conditioned upon an agreement concerning the entire contract (A. 47-48). As Rose testified:

> If we had reached a full agreement on the contract proposal we were willing to settle for the $1.41, $1.46 the following September ... (A. 48).

With respect to non-wage items at the May 5 meeting, the Union accepted Tyson's counter-proposal on uniform allowances (A. 87) and the Company accepted the Union's proposal on a job-bidding provision (A. 88). The Union withdrew its proposal on overtime and holiday pay, accepting Tyson's offer (A. 89) and the Union accepted Tyson's proposal for probationary employees (A. 89-90). As noted above, the parties were very close to agreement on wages. At the conclusion of this meeting the issue concerning the reinstatement of strikers remained open 6 / (A. 90).

The next meeting between the parties took place on May 16 in Fort Smith, Arkansas. Company negotiators Tyson and Wray were joined by attorney James Gilker. The Union was represented by Rose, Parker, Stanfield, another local Union representative and James Wishart, International Union Research Director (A. 49). According to Rose's testimony, in the record as an offer of proof in question and answer form, the meeting of May 16 opened as follows:

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6 / A strike commenced at Tysons on August 27, 1965 and continued until July 12 (A. 201, 398-399).

> Well, when the meeting first opened Mr. Gilker accused myself and President Lloyd of giving a snow job to Mr. Tyson. He said we took advantage of a man that knew nothing about contracts, and immediately Mr. Tyson then said, "Well, I am leaving the negotiations to Mr. Gilker. (A. 90)

The remainder of the meeting was spent by Gilker countermanding the agreements reached by his client on April 26 and May 5 and reverting back to the Company's proposals of November 3, 1965 (A. 91-92, 362-373). As Gilker said, according to Rose; "Have you got any language that would mean the same thing the Company has said, submit it to us" (A. 92).

The same parties met the next day, May 17, at Gilker's office. This was the first occasion where the parties departed from a discussion of a three-year wage package and the Company asked for an agreement to immediately institute a $1.41 base rate 7 / (A. 49). Parker, speaking for the Union, said he was not in a position to discuss the proposal because he had not received any wage information pursuant to his earlier request (A. 50-53, 134-135, 387) and therefore the Union did not understand the Company proposal's effect upon premium jobs and the various classifications (A. 93, 131-132). Parker also objected to the proposal because it did not include a retroactivity feature nor did it treat the issue of premium jobs (A. 132). Upon the Union's refusal to accept the immediate institution of a $1.41 base rate Gilker announced

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7 / This day, May 17, was the first meeting after the expiration of the certification year within which an employer is required to bargain regardless of the Union's de facto majority status. Brooks v. National Labor Relations Board, 348 U.S. 96, 75 S.Ct. 176 (1954).

that the Company would post a bulletin in its plant advising the employees that the Company wanted to increase their base pay but the Union would not let them do so (A. 92-93). The evidence of the May 17 meeting was received in the record.

Immediately after this meeting Gilker sent a letter to Parker stating, in part, as follows:

> Many months ago, the Company offered a lesser increase which was rejected by your Union and, since you indicated that you did not wish it placed in effect at that time, and since bargaining was actively continuing in an effort to reach an agreement, such an increase in wages was not placed in effect. We feel that the increase proposed is fair and equitable and that the employees are deserving of it at this time. It is our hope that you will take no action which might put in question the Company's right to install this wage adjustment immediately.
> (A. 351).

This letter was posted in the plant soon after May 17 by Knight, the personnel director 8 / (A. 163-164, 166-167). The letter was definitely posted as of May 24 because on that day Parker wrote to Gilker complaining about the posting (A. 354). The evidence with respect to the threat to post and the actual posting of the May 17 letter (A. 351) was received in the record.

Also on May 17 Parker again requested the wage information he had not received pursuant to his April 6 request (A. 388). The next day Parker received Knight's letter enclosing some of the material requested and stating further that he had sent the material to Parker on April 16 (A. 389-390). Knight appeared as a witness and did not testify as to when he supplied the partial

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8 / Knight testified, "I simply remember a letter being put on the bulletin board regarding that we would like to raise the folks to this $1.41 rate" (A. 166).

wage information and thus Parker's testimony that he did not receive this information until after May 17 (A. 142-143) is undisputed.

The only information supplied to the Union pursuant to Parker's requests was a list of all employees indicating whether they were classified as "grade 1, grade 2, grade 3 or prob." and Knight's statement 9 / that he did not understand the other information requested. (A. 397). As found by the Trial Examiner (A. 331; 143) at no time did the Company supply the information requested by Parker concerning the "elements, conditions, requirements, duties and/or functions of employees for each job classification." (A. 387). Significantly, up until May 18 or 19 when Parker received this limited information, all Company proposals were expressed in the terms of starting rate, grade 1 or grade 2 jobs (A. 373, 386). On May 18 or 19 Parker received a document indicating grade 1, grade 2, grade 3 and prob. job classification (A. 390) and no explanation, although he had asked for one, as to the elements, requirements, duties, etc. of each classification (A. 143).

On May 19 Parker requested that the Company not unilaterally institute the $1.41 base rate and Gilker immediately responded by terming Parker's position as "unreasonable and not in keeping with your professed interest in the employees" (A. 352-353). On May 24 Parker protested the posting of the letter to employees and again requested "all the information in our letter of April 6 and further request any rate being paid above your new base rate of $1.41, the name of the person, nature of the job and the amount the person receives over

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9 / Termed by the Trial Examiner as an "insincere plea" (A. 331, line 30).

the base rate" 10 /. (A. 354).

The petitions in support of the formal decertification petition were first circulated on May 24 (A. 358), no more than six days after Gilker's letter was posted in the plant 11 /. Employee Drue Smith testified that she was asked to sign the petition in order to "...vote it [the Union] in or vote it out so we could get a raise". (A. 37). Smith also testified to a conversation she and employee McElhanney had with Knight, where they asked him when they were going to get a raise and he stated he did not know anything about the raise but asked if they knew "when the election was going to come up for a vote" (A. 38-40). This conversation occurred before the circulation of the decertification petitions (A. 40). From May 24 to May 30, 139 employees signed the petitions (A. 324; 357-361). Knight admittedly knew the petitions were circulating (A. 161-162) and the Trial Examiner so found (A. 323). The facts set forth above concerning the decertification petitions are in the record and were not controverted by the Company.

The parties next meeting after May 17 was on May 27 in Kansas City. The Union was represented by Rose, Parker, Stanfield, Nothnagel and Wishart; the Company by Gilker and Tyson (A. 53). With respect to the wage issue the Company again asked to immediately institute its proposed $1.41 base rate. The Union, through Parker, proposed a base rate of $1.46 and objected to the

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10 / This information deals with the question of what are premium jobs and as the Trial Examiner found (A. 331) this information was never supplied.

11 / Gilker's letter is dated May 17 and indicates a carbon copy to Tyson (A. 351). If received by Knight and posted immediately one can reasonably assume it was posted sometime around May 18 or 19.

immediate institution of the $1.41 rate because: (1) the Company had already posted a notice to that effect, (2) the Union still did not have all the wage information it requested, (3) the Union wanted to discuss the issue of back pay and (4) the parties had not agreed on which jobs would be classified as premium jobs 12 / (A. 54, 93, 145-146). Tyson admitted that Parker raised the subject of premium pay at this meeting (A. 247).

With respect to the non-wage items discussed at the May 27 meeting, the Company adhered to its November 3, 1965 proposals on subcontracting and management rights clauses (A. 93-94). On the subject of supervisors performing the work of employees in the bargaining unit during emergencies, Parker asked that the Company bargain over the wages, hours, terms and conditions of employment of supervisors when engaged in unit work, but the Company, through Gilker, refused (A. 94-96).

On June 1 Edith Douthit, the decertification petitioner, mailed her signature sheets to the Board and they are time stamped as received by the Board on June 3 (A. 15). The formal petition for certification was not filed until more than five weeks later, on July 11 (A. 325; 29).

As to the events of June 6, there was a credibility dispute before the Trial Examiner and the Board as to whether Rose spoke with Company officials and if he had authority to assent to a wage increase. The Trial Examiner, affirmed by the Board, found that on June 6 the Company spoke to Rose by telephone and proposed the immediate institution of the $1.41 base rate to which Rose agreed (A. 324, 330).Further, the Trial Examiner found that Rose's

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12 / There is no dispute as to these facts and the Trial Examiner so found (A. 323).

authority, or lack of it, had no bearing upon the Company's lack of good faith.

On June 6 the Company admittedly 13 / posted the following notice to its employees:

> Effective Monday, June 6, 1966, the following base rate will be in effect: Starting rate .....$1.35 per hour; after 30 working days .....$1.41 per hour.
>
> All present premium rates will be increased to maintain Their present differential above base rate.
>
> Many other increases and improvements in company benefits have been proposed to the Union and would have been already placed into effect except for their delays and stalling tactics.
>
> Tyson's, in line with our past policies will always be the poultry plant with the greatest take-home pay, steadiest work and best job security.
>
> You will be pleased to see further announcements which will be made as soon as possible (A. 324-325).

C. The Events After June 6. 14 /

On July 6 the parties met in Kansas City. In attendance for the Union was Rose, Parker, Nothnagel and Steve Coyle, an International Union Vice-President; for the Company, Gilker and Tyson (A. 98-99). Rose told the Company that the Union was prepared to negotiate and complete an agreement and Parker added that now the International Union had authority to bind the local Union 15 /

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13 / (A. 342, ¶ 12; 349, ¶ IX).

14 / The Trial Examiner refused to admit into evidence any events after June 6. The following facts are in the record as an offer of proof in question and answer form.

15 / Up to this time Rose's participation in the negotiations was as the Poultry Director from the International (A. 43) who brought his expertise to the local negotiations. He did not possess the authority to speak for the local Union until June 21 (A. 355). Thus, even though he was found to have consented to the June 6 base rate increase (A. 330) such consent was unauthorized. This contention was rejected by the Trial Examiner and the Board (A. 318, 330, fn. 4).

(A. 100). The Company's immediate response was to recess for an hour and a half (A. 100).

Concerning the wage issue, the Company reduced its wage proposal to $1.41 effective May 1; $1.44 on February 1, 1967; $1.52 on August 1, 1967 and $1.67 on February 1, 1968 (A. 101). 16/

On non-wage items the Union agreed to all the Company's unyielding proposals except that with respect to the subcontracting article the Union requested the agreement be in the form of a signed letter outside of the contract rather than in the contract itself (A. 100). In short, the Company remained steadfast on all its positions; which were identical to its November 3, 1965 proposal, except to reduce its wage offer. The Union, desirous of obtaining a signed contract after more than one year of bargaining, agreed to all the Company's proposals if the Company would permit a dues check-off clause 17 / (A. 101-102). The Company recessed for about twenty minutes after which Tyson announced that he was not opposed to a check-off clause but he would first have to obtain the approval of his subordinates to whom he had promised that he would never grant a check-off 18 / (A. 102). Everyone shook hands on having concluded an agreement (A. 102). All that remained was for Gilker to draft the contract language, proof read it in Fayetteville, Arkansas with Parker and have it mailed to Rose in Chicago on

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16 / On May 5 the Company had offered $1.68 as the last wage increment (A. 46)

17 / The check-off provision would merely permit employees to authorize the Company to deduct their Union dues if they joined the Union. Arkansas has a right-to-work statute which was in effect at that time. Ark. Stat. Chap. 101, Sec. 1, et seq.; Lewis v. Jackson & Squire, 86 F. Supp. 354, 361 (D.C., Ark. 1949)

18/ The record shows that this promise was also made to employees before the Union was certified (A. 415, fn. 12).

Monday, July 11 for his signature (A. 102-103).

On Friday, July 8 Parker tried but was unable to reach Gilker. The formal petition for decertification was filed on July 11, a Monday (A. 325;29); presumably, it was mailed on the preceding Friday, July 8. This was more than five weeks after the signature sheets in support of the formal petition were completed (A. 357-361).

On July 11, when Rose did not receive the contract, as planned, he called Gilker who claimed to have been too busy but that he would complete the contract that day and Rose would have it on the next, July 12 (A. 103-104). When Rose did not receive the contract on July 12 he again called Gilker's office but was unable to reach Gilker. Rose called two or three times that day but was told each time by Gilker's secretary that Gilker would call back (A. 104). Rose finally reached Gilker on July 13 and inqured about the contract. Gilker claimed to have called the Board's Memphis office on another matter and then learned of the decertification petition (A. 104-105). Gilker then refused to complete the contract because of the pending decertification petition (A.105-106).

The strike by Tyson's employees ended on July 12 (A. 201). The strikers unconditionally offered to return to work (A. 398-399). The strikers were reinstated up on their request, but to less desirable positions then they held before the strike (A. 202-204).

In September the Company raised the base rate to $1.51 per hour and on October 16, 1967 the Company raised the base rate to $1.58 for the day shift and $1.63 for the night shift, without notice to or an opportunity to bargain by the Union (A. 177). These rates were higher than the Company's final

position on wages to the Union at the last meeting July 6: $1.44 on February 1, 1967 and $1.52 on August 1, 1967 (A. 101). The election was held on December 1, and the Union failed to obtain a majority of the votes cast. 19 /

On June 20, 1967 the General Counsel of the Board reversed in part the Regional Director's dismissal of the subject charges and the General Counsel authorized the issuance of the subject complaint upon the following theory:

> that the wage increase [on June 6] not only constituted unlawful unilateral action but was motivated by a desire to undermine the Union and give impetus to the decertification movement, and that the evidence with respect to the above violations reflected the absence of a good-faith effort by the Company to reach agreement with the Union.
> (A. 419).

III. The Trial Examiner's Ruling on Participation by the Union.

The General Counsel's evidence, which was received by the Trial Examiner, consisted of the following:

(1) The posting of Gilker's May 17 letter to Parker (A. 351).

(2) The fact that decertification petitions were being circulated, the date of their circulation and the Company's knowledge thereof (A. 13-15, 36-40, 157-164).

(3) The parties, negotiations but limited to discussions on the wage issue only (A. 42-55, 115-125).

(4) The contentions that Rose did not have authority to and did not give his assent to the June 6 wage increase (A. 55-68, 125-131).

The General Counsel refused to offer into evidence the Union's reasons for not agreeing to the institution of the $1.41 base rate. Pursuant to the Union's

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19 / The election was conducted after the Regional Director dismissed the subject charges but before the General Counsel authorized the issuance of a complaint (A. 325). Had the Regional Director originally acted as subsequently instructed by the General Counsel no election would have been held during the pending unfair labor practice complaint. Edward J. Schlachter Meat Co., Inc. 100 NLRB 1171.

argument the Trial Examiner ruled that evidence admissible 20 / (A. 49-53, 144-145). Thus, the evidence of the Union's requests for wage information and the Union's partial receipt of inconsistent information was received over the strenuous objections of the General Counsel 21 / (A. 131-143, 386-390).

The Union's counsel, in addition to introducing the evidence concerning requests for wage information, attempted to introduce evidence over the repeated objections of the General Counsel in the following areas:

(1) When and how the decertification movement began and the reasons for the hiatus between June 1, when the petitions were sent to the Board and July 11, when the formal petition was filed (A. 15-19, 27-35, 189-197).

(2) The full negotiations between the parties, particularly the other matters which were discussed at the meetings raised by the General Counsel (A. 68-98, 146-150).

(3) The events after June 6 pursuant to paragraph 15 of the complaint including the Company's failure to reinstate strikers to their former positions (A. 98-106, 150-152, 198-207).

The Trial Examiner refused to admit this evidence because of the General Counsel's position that the evidence was not relevant to his theory of the complaint, notwithstanding the clear and unambiguous allegations in the complaint (See generally A. 19, 25-26, 190-194, 197). When the conflict between the Union and the General Counsel first arose the Trial Examiner

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20 / The General Counsel contended that what Parker said in refusing to agree to the immediate institution of the base rate increase was "immaterial" (A. 144).

21 / The General Counsel "strenuously" objected (A. 139) because the office of appeals, in viewing the Regional office's investigation found this evidence to "lack merit" and be "irrelevant" (A. 138).

said, "I am adhering to the General Counsel's theory of the complaint as expressed to me in the pre-hearing conference" (A. 19). In observing that paragraph 15 of the complaint specifically alleged the Company's unlawful refusal to bargain on and after June 6 the Trial Examiner suggested to the General Counsel that he withdraw that paragraph because it "gives him [Union Counsel] a leg to stand on" (A. 74). The paragraph remained in the complaint upon the General Counsel's interpretation that it constituted only a conclusion (A. 75). With respect to post-June 6 evidence, the Trial Examiner observed only the General Counsel's interpretation of the complaint (A. 194, 197). The Trial Examiner reaffirmed these rulings in his decision (A. 326) and was affirmed by the Board (A. 317, fn. 3 and 319, fn. 7).

ARGUMENT

POINT I

THE BOARD REFUSED TO ADMIT THE UNION'S PROFFER OF EVIDENCE WHICH WAS RELEVANT AND MATERIAL TO THE ALLEGATIONS CONTAINED IN THE COMPLAINT

Manifestly, a charging party - being the one who initiates the statutory machinery - is a full party. This was made clear in International U., United A., A & A.I.W. v. Scofield, 382 U.S. 205, 86 S. Ct. 373 (1965) where the Court said [382 U.S. at 219, 86 S. Ct. at 382]:

> The statutory machinery begins with the filing of an unfair labor practice charge by a private person, § 10(b), 61 Stat. 146; see also, 24 Fed. Reg. 9102 (1959), 29 CRF § 102.9 (1965). When the General Counsel issues a complaint and the proceeding reaches the adjudicative stage, the course the hearing will take is in the agency's control, but the charging party is accorded formal recognition: he participates in the hearings as a "party", [citing 29 CFR § 102.8 1965] he may call witnesses and cross-examine others, may file exceptions to any order of the trial examiner, and may file a petition for reconsideration to a Board order, 28 Fed. Reg. 7973 (1963), as amended, 29 CFR § 102.46 (1965).

See also: Marine Engineer's Beneficial Association No. 13 v. N.L.R.B., 202 F. 2d 546, 550 (C.A. 3, 1953), cert. denied 346 U.S. 819 74 S. Ct. 32; U.A.W. v. N.L.R.B., 231 F. 2d 237, 242 (C.A. 7, 1956); Leeds & Northrup Company v. N.L.R.B., 357 F. 2d 527, 531-533 (C.A. 3, 1966).

As a party, the charging party's right to participate extends to all matters encompassed in the complaint, notwithstanding the General

Counsel's manner or means of proof. 22 / In Spector Freight System, Inc. 141 NLRB 1110 the Board said [at 1112]:

> ....the denial of a request [by a charging party] to examine on matters not covered by the General Counsel on direct or on matters developed during the cross-examination only because the General Counsel has refused to examine the witness on such matters, without more, constitutes an erroneous limitation on the charging party's participation in the examination of witnesses.

And in General Maintenance Engineers, Inc. 142 NLRB 295 the Board said:

> Where, as here, relevant evidence has been adduced at a hearing, the General Counsel no longer retained absolute control over the complaint. (Emphasis supplied).

Thus it is clear that while the General Counsel has authority to issue the complaint, he may not thereafter unilaterally control the course of those proceedings or the admission of evidence.

The Supreme Court's decision in the Scofield case (382 U.S. at 218, 86 S. Ct. at 382) recognized that a charging party's private interests are as much within the statutory scheme as the public interest in minimizing labor-

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22 / The Board's rules and regulations, 29 CFR §102.38 provides:

> Any party shall have the right to appear at such hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence, except to the extent permitted by the Trial Examiner....

The phrase "to the extent permitted by the Trial Examiner" has been defined as limited only to "irrevelant, immaterial or unduly repetitious evidence." Spector Freight System, Inc. 141 NLRB 1110, 1111. See Also: Administrative Procedure Act, 5 U.S.C.A. §556(d).

management disputes represented by the General Counsel and concluded that a successful charging party before the Board has a right to intervene in proceedings before a Circuit Court of Appeals. Thus, the Scofield decision necessarily contemplates that a charging party throughout the entire Board proceedings has the right to be heard in support of its position upon the complaint, notwithstanding the General Counsel's failure to accept that position or offer evidence in its support. To hold otherwise would prevent a charging party from establishing at the hearing before the Board any basis to support its contentions before an Appellate Court and therefore render the Scofield decision as empty and meaningless.

The right of a party to be heard necessarily includes the right to notice of the allegations in the complaint. Early in the history of Federal administrative regulation the Supreme Court in Morgan v. United States, 305 U. S. 1, 58 S. Ct. 773 (1938) set down the following general requirements [304 U.S. at 18-19, 58 S. Ct. at 776-777]:

> The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.
>
> * * *
>
> Congress, in requiring a "full hearing" had regard to judicial standards - not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature.
> (Emphasis supplied)

These elemental concepts are now statutorily imposed upon federal administrative agencies. The Administrative Procedure Act, 5 U.S.C.A. § 554(b)(3) provides:

> (b) Persons entitled to notice of an agency hearing shall be timely informed of - ...(3) the matters of fact and law asserted.

See also: Green Spring Dairy v. Commissioner of Internal Revenue, 208 F. 2d 471, 475 (C.A. 4, 1953); N.L.R.B. v. Johnson, 322 F. 2d 216, 219 (C.A. 6, 1963); Russell-Newman Mfg. Co. v. N.L.R.B., 370 F. 2d 980, 984 (C.A. 5, 1966); National Broadcasting Co. v. F.C.C., 362 F. 2d 946, 953 (C.A.D.C., 1966).

Upon the foregoing authority it is clear that the Board greviously denied the Union its right to notice of the allegations of the complaint and its right to participate and be heard as a "party".

Despite the unambiguous allegations in the complaint, the General Counsel limited his evidence to the fact that the Company announced a wage increase to its employees around May 18, which was immediately followed by a decertification movement and that on June 6 the Company unilaterally instituted the earlier announced wage increase 23 / (A. 20). All other evidence proffered by the Union was objected to by the General Counsel upon the grounds that the proffer was outside the bounds of the complaint. 24 / All the General Counsel's

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23 / We shall establish in Point II infra that this evidence, limited as it was, established a violation of Section 8(a)(5) even assuming arguendo the Union's consent to the wage increase. But for the Board's improper exclusion of the Union's evidence it would have had a more detailed record upon which to find the violations alleged.

24 / It is significant to note that the General Counsel's basis for objection, like the basis for all objections, was that the evidence proffered "...went through the office of appeals, through the investigation and has been found to lack merit, and as such is irrelevant" (A. 138). This utter disregard by the General Counsel and the Board for the statutory separation of their functions (Lewis v. National Labor Relations Board, 357 U.S. 10, 16, fn. 10, 78 S.Ct. 1029, 1033) resulted in the total deprivation of the charging party's rights to be heard.

objections but one were sustained by the Trial Examiner 25 / upon the basis that it was the General Counsel's complaint, and anything not intended by the General Counsel as within the complaint was excludable, notwithstanding the specific allegations of the complaint or the general principles of relevancy and materiality. The following are representative of the Trial Examiner's rulings throughout the hearing:

> I am adhering to the General Counsel's theory of the complaint as expressed to me in the pre-hearing conference. (A. 19)
>
> * * *
>
> General Counsel has told me that is all that is embraced within this complaint, and that is what I am going to confine this hearing to. (A. 25)
>
> * * *
>
> The [facts surrounding the circulation of the petition] have been ruled on by the General Counsel, and that much I am certain I am not going to receive anything on. (A. 26, emphasis supplied).

After the General Counsel rested the Union attempted to present additional facts to support the complaint, and the following colloquy between the Trial Examiner and the Union's counsel took place:

> Mr. Orlove: I gather from your ruling here, from rulings that you made yesterday, the cumulative effects of which are to place me in the very same shoes as the General Counsel and limit me to the limit he has placed around himself.
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> Trial Examiner: Yes.
> (A. 190)

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25 / The only exception hereto was the Union's evidence of the Company's failure to provide requested wage information which was received over the General Counsel's strenuous objection (A. 137-139).

With respect to all the post-June 6 events, as alleged in paragraph 15 of the complaint (A. 342, ¶ 15), the Trial Examiner suggested that that paragraph be striken because it gave the Union "...a leg to stand on." (A. 72-74). The General Counsel did not withdraw paragraph 15 but explained it as "not an evidentiary paragraph. It is a conclusion, pure and simple..." (A. 75). Based upon this clandestine contention, the Trial Examiner refused to admit the facts proffered by the Union in support of paragraph 15 26/.

The Trial Examiner and the Board predicated their exclusion of the Union's evidence upon a line of cases which hold that a charging party may not attempt to amend a complaint and thus infringe upon the General Counsel's statutory authority granted in Section 3(d) of the Act (29 U.S.C.A. § 153(d)) 27 /. Those cases are

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26 / This is clear from the Trial Examiner's reaction to the parties arguments in general (A. 69-77) and his later ruling:

> I am not going to permit you to adduce evidence in support of a theory which is inconsistent with the theory of the General Counsel (A. 194).

Note, further, the Trial Examiner's refusal to admit evidence of the Company's subsequent unilateral wage increases in amounts greater than it had offered the Union in bargaining (A. 176-177).

27 / The Board said that to have permitted the Union's testimony of events after June 6 "would have had the effect of amending the complaint without the General Counsel's consent," citing United Steelworkers of America v. N.L.R.B. (Luxaire, Inc.) 393 F. 2d 661 (C.A.D.C., 1968) (A. 319, fn. 7). The cases cited upon the Trial Examiner are: Piasecki Aircraft Corp. v. N.L.R.B., 280 F. 2d 575 (C.A. 3, 1960); Wellington Mill Div., West Point Mfg. Co. v. N.L.R.B., 330 F. 2d 579 (C.A. 4, 1964); Frito Company, Western Div. v. N.L.R.B., 330 F. 2d 458 (C.A. 9, 1964); Phillip Carey Mfg. Co., Miami Cabinet Div. v. N.L.R.B., 331 F. 2d 720 (C.A. 6, 1964); Local 282, International Brotherhood of Teamsters v. N.L.R.B., 339 F. 2d 795 (C.A. 2, 1964); International Union, United Automobile, etc. v. N.L.R.B., 231 F. 2d 237 (C.A. 7, 1956); International Union of Electrical etc. v. N.L.R.B., 289 F. 2d 757, (C.A.D.C., 1960); Sailors Union of the Pacific, AFL (Moore Dry Dock Company), 92 NLRB 547; Dallas Concrete Company, 102 NLRB 1292, enforced, 212 F. 2d 98 (C.A. 5, 1954); General Electric Company Battery Products, Capacitator Department, 163 NLRB No. 30, TXD, p. 32.

clearly inapposite here because the evidence proffered by the Union falls squarely within the four corners of the complaint, as we shall show, infra, and thus the evidence did not "amend the complaint". The impropriety of the Board's ruling is glaringly apparent from its consideration of paragraph 15 [28] of the complaint where it said:

> The complaint alleged no more than a refusal to bargain by the unilateral increase in the base rate of pay, and that despite the seemingly broad language in paragraph 15 of the complaint, it was not the General Counsel's intent to allege otherwise (A. 319, fn. 3, emphasis supplied).

Thus, the Board's ruling establishes the General Counsel's intent as notice of that which is alleged and not the unequivocal, unambiguous language of the complaint. This is diametrically opposed to any concept of due process owed to a party and totally antithetic to the notice requirements of the Administrative Procedure Act. Administrative Procedure Act, 5 U.S.C.A. § 554(b)(3); Morgan v. United States, 304 U.S. 1, 18-19, 58 S.Ct. 773, 776-777(1938); N.L.R.B. v. Johnson, 322 F. 2d 216, 219 (C.A. 6, 1963); Russell-Newman Mfg. Co. v. N.L.R.B., 370 F. 2d 980, 984 (C.A. 5, 1966).

The parochial rulings of the Trial Examiner and the Board, relying upon the General Counsel's determinations of relevancy and materiality and his "intent" of what was alleged in the complaint rendered the Union, a charging party here, no better than a bastard child, "to be seen and not heard" with respect to the complaint.

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28 / Paragraph 15 of the complaint alleged as follows:

> Commencing on or about June 6, 1966, and at all times thereafter, Respondents negotiated with the Union in bad faith and with no intention of entering into any final or binding collective bargaining agreement.
> (A. 342, ¶ 15).

Morgan v. United States, 305 U.S. 1, 18-19, 58 S. Ct. 773, 776-777 (1938); International U., United A., A & A.I.W. v. Scofield, 382 U.S. 205, 219, 86 S.Ct. 373, 382 (1965); 5 U.S.C.A. § 556(d); 29 CFR § 102.38 (1965); Spector Freight System, Inc., 141 NLRB 1110, 1111. We shall hereinafter set forth the evidence proffered by the Union and the basis upon which it was relevant, material and directly within the four corners of the complaint and predicated thereon it will be clear that Board's rejection of the evidence constituted a gross denial of due process.

A. The Pre-June 6 Evidence Establishing the Company's Lack of Good Faith.

An issue framed by the complaint was, inter alia, the Company's good faith or lack of good faith in instituting wage increases on June 6. Other issues raised in the same allegation were whether the Company was motivated by a desire to undermine the Union and whether its conduct was intended to encourage its employees to decertify the Union (A. 342, ¶ 14). 29/

29/ There can be no question that the General Counsel's complaint alleged the Company's bad faith generally. In his letter to the parties the General Counsel authorized the issuance of a complaint as follows:

> ...predicated in essence on allegations that the wage increase not only constituted unlawful unilateral action but was motivated by a desire to undermine the Union and give impetus to the decertification movement, and that the evidence with respect to the above violations reflected the absence of a good faith effort by the Company to reach agreement with the Union. (A. 419, emphasis supplied)

In N.L.R.B. v. Katz, 369 U.S. 736, 82 S.Ct. 1107 (1962), the Supreme Court recognized the Board's authority under Section 8(a)(5) as follows: [369 U.S. at 747, 82 S. Ct. at 1114]:

> ...to order the cessation of behavior which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion, or which reflects a cast of mind against reaching agreement.

Thus, the General Counsel's allegation of conduct in paragraph 14, as violations of Section 8(a)(5), raised an issue of the Company's good faith or lack of it in general vis-a-vis its regard for the Union's bargaining status as well as its good faith in instituting the June 6 increases.

In determining an employer's good or bad faith this Court in Local 833, UAW-AFL-CIO v. N.L.R.B., 300 F. 2d 699, 706 (C.A.D.C., 1962) relied upon the test set forth by Justice Frankfurter in his concurring opinion N.L.R.B. v. Truitt Mfg. Co., 351 U.S. 149, 155, 76 S.Ct. 753, 757 (1956) as follows:

> A determination of good faith or of want of good faith normally can rest only on an inference based upon more or less persuasive manifestations of another's state of mind. The previous relations of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations constitute the raw facts for reaching such a determination.

And in N.L.R.B. v. Insurance Agents' International Union, 361 U.S. 477, 508, 80 S. Ct. 419, 437 (1960) Justice Frankfurter, in his separate opinion said:

> The Board's function in the enforcement of the duty to bargain does not end when it has properly drawn an inference unfavorable to the respondent from particular conduct. It must weigh that inference as part of the totality of inferences which may appropriately be drawn from the entire conduct of the respondent, particularly its conduct at the bargaining table. The state of mind with which the party charged with a refusal to bargain entered into and participated in the bargaining process is the ultimate issue upon which alone the Board must act in each case, and on the sufficiency of the whole record to justify its decision the courts must pass. (Emphasis supplied)

See also: N.L.R.B. v. Fitzgerald Mills Corporation, 313 F. 2d 260, 266 (C.A. 2, 1963); Montgomery Ward and Co., Incorporated, 154 NLRB 1197, 1238, enforced as modified, 373 F. 2d 655 (C.A.D.C., 1966).

Upon these controlling principles of law the Union offered evidence of the Company's anti-union motivation in general and its maneuverings which subjected the Union to unjustified damnation by the employees it was beholden to represent. That these facts were not alleged as independent violations was within the authority of the General Counsel under Section 3(d) of the Act; however, the Board seriously erred in failing to exercise its independent determination of these facts upon the general issue of good or bad faith raised in paragraph 14 of the complaint.

1. The Company's Pre-Certification Misconduct.

The Union requested the Board to take official notice of the Regional Director's decision and direction of election in case No. 26-RC-2224 (Un. Exh. 10), a hearing officer's report and recommendation on objections to an election held pursuant to that decision and direction of election (A. 401-415) 30 /, and the Board's decision on review of the hearing officer's report (A. 205-207, 416). These exhibits are relevant to establish the Company's hostility to the Union before it was certified and its effort, successful in the first election, to dissipate the Union's majority. In Local 833, UAW-AFL-CIO, etc. v. N.L.R.B., 300 F. 2d 699, 706 (C.A.D.C., 1962) this Court said:

> [T]he Board improperly ignored the inferences to be drawn from Kohler's pre-1953 labor relations history in assessing its intent at the bargaining table in 1954.

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30 / The hearing officer found that the Company created an atmosphere of threats, futility and fear of reprisal thus requiring a new election (A. 415).

See also: N.L.R.B. v. Reed & Prince Mfg. Co., 205 F. 2d 131, 139 (C.A. 5, 1953), cert. denied, 346 U.S. 887, 74 S. Ct. 139 (1953); N.L.R.B. v. Denton, 217 F. 2d 567, 570 (C.A. 5, 1954); N.L.R.B. v. United Nuclear Corporation, 381 F. 2d 972, 979 (C.A. 10, 1967); Patent Trader, Inc., 167 NLRB No. 120, TXD, p. 24. Therefore, the Board improperly excluded evidence which was essential in determining the Company's lack of good faith.

2. The Company's Cancellation of Agreements.

As detailed more fully in the Statement of the Case (see supra p.p. 7-9), substantial progress was made towards reaching full agreement. On April 26 the Company, through its president, Tyson, agreed on a "complete agreement" clause (A. 82),a subcontracting clause 31 / (A. 82) and the clause with respect to working supervisors (A. 83-84). Tyson's only comment was that he wanted his attorney Gilker to check the language (A. 82, 84). At this stage the parties were less than one cent apart on economic matters (A. 84).

At the next meeting, May 5, Tyson and his manager agreed to the Union's job-bidding provision (A. 88) and the Union agreed to Tyson's counter-proposal on uniform allowances (A. 87), overtime and holiday pay (A. 88) and probationary employees (A. 89-90). Manifestly, the parties were engaging in the give and take which is characteristic of a good faith effort to reach an accord albeit the Company at this late date had not yet complied with the Union's requests for

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31 / The subcontracting clause proposed by the Union and agreed to by Tyson provided for nothing more than the Union's rights as enunciated by the Supreme Court in Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203, 85 S. Ct. 398 (1964) that the decision to subcontract and the effects thereof were subject to collective bargaining (A. 384-385).

wage information.

This productive atmosphere was soon destroyed by the recurrence of Gilker on May 16. Gilker accused the Union of giving Tyson a "snow job" and all previous agreements made by the Company's chief official were countermanded by Attorney Gilker (A. 90-92). This put the Company back to its position of November 3, 1965, six months earlier (A. 362-373). Gilker's statement, "Have you got any language that would mean the same thing the Company has said, submit it to us" (A. 92), clearly indicated a Company intention to remain fixed to its November 3, 1965 status quo proposals 32 /. Thus, Gilker did not check the language to conform to the parties' earlier agreements as Tyson claimed he would, but he negated the substance of the agreements. This conduct in itself is violative of the Act, 33 / and this twelvth hour reversion (the certification year ended as of this meeting) to the November 3, 1965 status quo proposals manifestly constitutes evidence of the Company's bad faith. What was said of another employer's patently improper contract proposal in National Labor Relations Board v. Reed & Prince Mfg. Co., 205 F. 2d 130, 139 (C. A. 1, 1953) is equally applicable here:

> It is difficult to believe that the Company with a straight face and in good faith could have supposed that this proposal had the slightest

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32 / These proposals were nothing more than a codification of existing conditions of employment (A. 116-117). With respect to subcontracting the Company was in effect demanding that the Union waive its right to bargain over the decision to subcontract (A. 371-372 and see footnote 31 supra).

33 / N.L.R.B. v. Shannon, 208 F. 2d 545 (C.A. 9, 1953); Rice Lake Creamery Company, 131 NLRB 1270 at 1294-1295, enforced, 302 F. 2d 908 (C.A.D.C., 1962); Mooney Aircraft, Inc., 132 NLRB 1194 at 1201-1202, enforced, 310 F. 2d 565 (C.A. 5, 1962); Southwestern Porcelain Steel Corporation, 134 NLRB 1733, 1742, enforced, 317 F. 2d 527 (C.A. 10, 1963); Newberry Mills, Inc., 141 NLRB 1167, 1168.

> chance of acceptance by a self-respecting union, or even that it might advance the negotiations by affording a basis of discussion; rather, it looks more like a stalling tactic by a party bent upon maintaining the pretense of bargaining.

In Brooks v. National Labor Relations Board, 348 U.S. 96, 100, 75 S.Ct. 176, 179 (1954) the Supreme Court said:

> It is scarcely conducive to bargaining in good faith for an employer to know that, if he dilly dallies or subtly undermines, union strength may erode and thereby relieve him of his statutory duties at any time ...

While the Company was solely at fault in delaying the formulation of a collective bargaining agreement, by the conduct related herein and by refusing to provide wage information, it shifted the blame upon the Union in its May 17 letter, posted to employees, and its June 6 announcement of wage increases (A. 351, 342, ¶ 12). This falsehood is itself inimical to good faith 34 /, but more importantly the employees were unjustifiably motivated to initiate decertification proceedings. The Board's failure to consider this evidence deprived the Union of having the complaint issued upon its charge determined on the basis of all relevant and material evidence. N.L.R.B. v. Truitt Mfg. Co., 351 U. S. 149, 155, 76 S.Ct. 753, 754 (1956); Local 833, UAW-AFL-CIO v. N.L.R.B., 300 F. 2d 699, 706 (C.A.D.C. 1962).

3. The Company Refused to Bargain Over the Wages, Hours, Terms, and Conditions of Employment of Its Supervisors While Performing Unit Work.

The Union's offer of proof establishes that at the May 27 meeting, Gilker

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34 / The Supreme Court said in N.L.R.B. v. Truitt Mfg. Co., 351 U.S. 149, 152, 76 S.Ct. 753, 755-756 (1956): "Good faith necessarily requires that claims made by either bargainer should be honest claims."

insisted that Tyson's past practice of using supervisors when necessary to perform the work of unit employees would continue. The Union sought a clause which would prohibit a supervisor from performing the unit work to the detriment of unit employees (A. 372, 385). After Gilker took this position, Parker requested as a compromise that the Company bargain over the wages and hours of supervisors when they were performing unit work. This request would have permitted the Company to maintain its past practice and still protect the employees. Gilker flatly refused to discuss this subject (A. 94-95). The Board has held in Mobil Oil Company, 147 NLRB 337, 344 (see also NLRB Twenty-ninth Annual Report, p. 75), that the wages, hours, and terms and conditions of employment of supervisors, while performing as employees, is a mandatory subject of bargaining. Thus, the Company's refusal was an outright violation of its duty to discuss a mandatory subject of bargaining (N.L.R.B. v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 348-349, 78 S.Ct. 718, 722 (1957) and further undermined the Union's bargaining status. These facts are relevant in establishing the Company's bad faith immediately preceding the institution of the wage increases, and therefore the Union, as a party, had a right to introduce this evidence.

B. Evidence of the Company's Bad Faith After June 6.

The complaint specifically alleged that the Company violated the Act by refusing to bargain on and after June 6 and by refusing to reach any final agreement with the Union (A. 342, ¶ 15). As argued herein (see supra p.p. 20-27) the Board committed a gross error by denying the Union its right to

introduce evidence in support of that allegation. The evidence proffered by the Union is as follows:

1. The Company Ultimately Agreed to a Contract But Delayed Signing of that Contract to Permit the Filing of the Decertification Petition.

As detailed more fully in the Statement of the Case (see supra p.p. 14-16) the next meeting after the alleged June 6 conversation was on July 6 (A. 99).

At this meeting, the Company remained fixed to its prior position, the November, 1965 status quo proposal, except that it agreed to take its sub-contracting proposal out of the contract but have it in effect between the parties by means of an exchange letter (A. 100). With respect to wages, the Company reduced its offer to $1.41 effective May 1; $1.44 effective February 1, 1967; $1.52 effective August 1967; and $1.67 effective February 1968 35 / (A. 101). Thus, the Company's position remained substantially the same as in November 1965 (A. 101) except to reduce slightly its wage proposals. It is obvious from reading Rose's testimony of this meeting, that the Union was interested in having any contract for the sake of attaining a stable labor relations after more than one year of bargaining. Therefore, the Union was completely submissive to Tyson's proposals, requesting only that the contract contain a dues check-off (A. 101-102). After a Company requested recess Tyson said he would agree but first he had to tell his subordinates at the plant to whom he had earlier promised that there would never be a check-off (A. 102).

As the later facts will show the Company had no intention of reaching an agreement, regardless of the terms, but for the moment an agreement was

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35 / See footnote 16 supra.

seemingly reached. Everybody shook hands on it, and the only remaining matter was to arrange for the preparation of a typed copy to be signed. Although Gilker promised to have the contract ready on July 8 for signing on Monday, July 11, he claimed to be too busy and then became mysteriously unavailable despite Parker's and Rose's repeated efforts to reach him (A. 102-104). Finally, on July 13 (Wednesday), Rose was finally able to reach Gilker, but by this time the decertification petition which had been completed six weeks earlier was filed (A. 29) and as a very suspicious coincidence, Gilker claimed to have called the Memphis Regional Office on some other matter and to have been told that the petition was filed by a Tyson employee (A. 104-105). On that day and the next, Rose and Gilker discussed the possibility of raising their oral agreement as a bar to the decertification petition, but Gilker took the firm position, understandably enough considering what he had done in the preceding two months, of not contending that the contract constituted a bar (A. 105-106).

This evidence must be viewed as part and parcel of the Company's unlawful announcements to its employees on May 17 (A. 351) and June 6 (A. 342, ¶ 12). As Justice Frankfurter said in his separate opinion in N.L.R.B. v. Insurance Agents International Union, 361 U.S. 477, 506, 80 S.Ct. 419, 436 (1960):

> Activities in isolation may be wholly innocent, lawful and "protected" by the Act, but that ought not to bar the Board from finding, if the record justifies it, that the isolated parts "are bound together as the parts of a single plan [to frustrate agreement]. The plan may make the parts unlawful." Swift & Co. v. United States, 196 U.S. 375, 396, 25 S. Ct. 276, 279, 49 L. Ed. 518.

Upon this legal standard it becomes clear that the Company's scheme was to generate a decertification movement and use it to serve its own fancy while

bargaining. In this manner the Company was able to orally agree with the Union on a contract it had forestalled for months, then drag its feet in formalizing the contract until the six week old decertification petition could be mysteriously resurrected. 36/ This presents at a minimum prima facie case of bargaining in bad faith. N.L.R.B. v. Certain-Teed Products Corporation, 387 F. 2d 639, 641 (C.A. 5, 1968); Feed and Supply Center, Inc., 127 NLRB 276, 277, enforced, 294 F. 2d 650 (C.A. 9, 1961); Montgomery Ward & Co., Incorporated, 154 NLRB 1197, 1257, enforced as modified, 373 F. 2d 655 (C.A.D.C., 1967); Ridge Citrus Concentrate, Inc., 133 NLRB 1178, 1182-1184; The Perry Rubber Company, 133 NLRB 225, 228. Inasmuch as these facts fall squarely within the conduct alleged as a violation in paragraph 15, i.e. "negotiated with the Union in bad faith and with no intention of entering into any final or binding collective bargaining agreement," it was clearly an error for the Board to have refused to consider this evidence.

2. Further Unilateral Wage Changes.

The Union's offer of proof 37 / establishes that in September the Company raised the base rate to $1.51 per hour and on October 16, 1967, raised the base rate seven cents per hour with an additional five cents per hour night shift premium. These raises went into effect without notice to or an opportunity to

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36 / The Union made every effort on several occasions to interrogate Douthit, the decertification petitioner, for an account of why the petition was not filed upon its completion, June 3,(A. 17-19, 187-197) giving a full explanation of the purpose and theory of this line of questioning (A. 21-26) but was denied this right.

37 / The Company's personnel manager, Knight, confirmed the facts proffered to be true (A. 177).

bargain by the Union (A. 177). The record also establishes that the Company's final position on wages at the July 6 meeting was $1.41 effective May 1, 1966; $1.44 effective February 1, 1967; and $1.52 effective August 1967 (A. 101). This was, according to the Company, the most that it was willing to pay as a result of more than one year of very hard bargaining. But with a decertification petition pending and the Union seemingly broken Tysons discovered that it could afford to pay as much as $1.51 in September of 1966, as compared with its offer to the Union of $1.44 in February of 1967; and $1.58 ($1.63 for night shift) in October of 1967, as compared with the $1.52 proposal to the Union. There can be no question that conduct of this nature is condemned by § 8(a)(5) of the Act, and when it occurs in the context of a bargaining relationship under attack by a decertification petition, it constitutes a gross violation of § 8(a)(5) of the Act. N.L.R.B. v. Crompton-Highland Mills, 337 U.S. 217, 223, 69 S.Ct. 960, 963 (1949); N.L.R.B. v. Katz, 369 U.S. 736, 743, 82 S.Ct. 1107, 1111 (1962). As this conduct was specifically alleged in paragraph 15, the Board erred in failing to admit and consider it.

3. The Company's Failure to Reinstate Strikers.

On July 15, the Union ended its strike and made an unconditional offer to return to work on behalf of the following employees: Robert Bowers, Lorena Perryman, Pauline Bowerman, Rose Carender, Betty Lansdowne, and others (A. 398-399). The Union offered to prove that the following employees were denied reinstatement to the following formerly held positions and instead were rehired as new employees to perform more arduous or less desirable jobs:

Employee	Pre-Strike Position	Position Upon Return to Work
Pauline Bowerman	Cropping and Inspecting	Gizzard cutting (for one month before being returned to Cropping and Inspecting).
Rose Carender	Pinning (feather plucking)	Drawing
Betty Lansdowne	Cutting neck skins and Pinning	Cropping (she quit upon the doctor's advice that the job was too difficult).
Lorena Perryman	Trimmer	Drawing
Robert Bowers	Operating and maintaining refrigeration equipment (days).	General machinery maintenance (nights).

(A. 202-204).

When their former jobs became available they requested transfer to their former positions but were denied (A. 203). The Trial Examiner would not receive this evidence (A. 202).

These facts establish further unlawful conduct by the Company 38 /and constitute additional evidence of bad faith after June 6. With the decertification petition pending, the Company's adverse treatment of known union adherents

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38 / The totality of evidence as argued herein, establishes that the strike was caused, or at a minimum, prolonged by the Company's refusal to bargain in good faith thereby obligating Tysons to reinstate strikers to their former or substantially equivalent position upon their unconditional offer of reinstatement. N.L.R.B. v. Southwestern Porcelain Steel Corporation, 317 F. 2d 527, 531 (C.A. 10, 1963); N.L.R.B. v. Fitzgerald Mills Corporation, 313 F. 2d 260, 269 (C.A. 2, 1963); San Antonio Machine & Supply Corporation v. N.L.R.B., 363 F. 2d 633, 641 (C. A. 5, 1966); even assuming the strikers were not unfair labor practice strikers, they were still entitled reinstatement upon the departure of their replacement or when their former position became available. N.L.R.B. v. Fleetwood Trailer Co., 389 U.S. 375, 378, 88 S.Ct. 543, 546 (1967); Laidlaw Corp., 171 NLRB No. 175.

constitutes further support to the allegation that it sought to undermine the Union's status by making strikers an object lesson of the futility of supporting the Union.

Therefore, this evidence falls within the allegations of paragraph 15 of the complaint and paragraph 17, which alleges that the Company's conduct of unilaterally granting a wage increase on June 6 constitutes a violation of § 8(a)(3) of the Act. In view of the General Counsel's general allegation of § 8(a)(3) 39 / we are within the area of unlawfulness which he has alleged against the Company.

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39 / As found by the Trial Examiner the General Counsel refused to support the allegation of a violation of § 8(a)(3) (A. 332, fn. 5). The Board found it unnecessary to decide this point in view of its dismissal of the complaint (A. 318, fn. 5).

POINT II

THE FACTS RECEIVED INTO EVIDENCE ESTABLISH A VIOLATION OF SECTION 8 (a) (5)

The limited facts offered by the General Counsel and received into evidence, which for the most part were uncontroverted, establish that the Company violated Section 8(a)(5) as alleged in the complaint. The Board erred here by failing to apply controlling principles of law to the Company's unilateral institution of premium rates and by failing to consider all the evidence in support of the allegations of undermining the Union's status and encouraging the decertification movement (A. 342, ¶ 14).

A. The Failure to Bargain Over Premium Rates.

As the Trial Examiner found, and by the Company's own admission, it never requested the Union's approval of an increase in premium rates (A. 331; 49, 119, 222-223, 279, 300). The record establishes the very obvious reason why such approval was not sought. The number of premium jobs were in dispute (A. 85) 40 /, the Union did not know which jobs were premium jobs and therefore did not know which employees would be affected by the raise (A. 50-52, 131-132) and specifically the Union desired bargaining on the premium rates before it would agree to the base rate (A. 132, 300) 41 /.

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40 / This evidence is partially in the record as an offer of proof because the Trial Examiner would not hear evidence of the April 26 meeting except with respect to wage proposals (A. 69-71). However, Attorney Gilker admitted under cross-examination that premium jobs were in dispute (A. 300).

41 / In general the Company's witnesses could not remember what the Union said in refusing the $1.41 rate (A. 246), but Tyson specifically recalled Parker's objection to the base rate increase because of premium jobs (A. 247), and Gilker specifically recalled, "he [Parker] also wanted premiums that we were not agreeable to over and above the base" (A. 300, emphasis supplied).

The Board's decision totally ignores these facts which are in the record and undisputed. The complaint specifically alleges the entire conduct of the Company on June 6, the $1.41 base rate and the starting rate and premium rate as a violation of Section 8 (a)(5) and the Company admitted that it instituted the entire wage increase, including the premium rates (A. 342, ¶ 12 and 13; 349, ¶ IX). Thus, the Board's finding that only the base rate was alleged as unlawful and no other allegation was litigated (A. 319) is completely contrary to the record and the wording of the complaint 42/. The facts of what Parker said in rejecting the Company's proposal, cited immediately above and in part from the Company's witnesses, indicate that a failure to give notice of a raise in premium rates was indeed litigated by all parties and admitted into evidence by the Trial Examiner. Therefore, the Board was in error to have found that the premium rate issue was not litigated. General Drivers and Helpers Union, Local 662 v. N.L.R.B., 302 F.2d 908, 912 (C.A.D.C., 1962), cert. denied 371 U.S. 827, 83 S. Ct. 48 (1962); Local No. 152 v. N.L.R.B., 343 F.2d 307, 308-309 (C.A.D.C., 1965).

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42 /Once again the Board appears to be relying upon the General Counsel's intent to allege only the $1.41 rate as unlawful but even the General Counsel's statements on the record will not support this view because the General Counsel always referred to the conduct of June 6 as the wage increase (A. 20, 70), thus, he alleged all the increases of June 6 as unlawful. See also paragraph 12 of the complaint (A. 342, ¶ 12).

The Board went on to hold that even assuming that premium rates were litigated ". . .there is no showing that the increase in pay for employees working on premium pay amounted to anything more than an adjustment in their base rate which was the same as for non-premium jobs" (A. 319). First, there is no evidence in the record that premium employees are paid a base rate plus a premium and therefore it was completely unwarranted for the Board to have found that the premium pay amounted to an adjustment in premium employees' base rate 43 /. Secondly, throughout the bargaining Parker sought to learn which jobs were premium jobs and the bases upon which the Company regarded a classification as a premium job. This information was never given to Parker; however the Company granted a wage increase to an undetermined number of employees upon an undetermined basis at a time when the Union was demanding to know precisely that information. Thus, it was not merely an "adjustment" as the Board finds, but the premium wage increase constituted a unilateral determination of which jobs were to be treated as premium jobs. Moreover, the increase to premium employees, while raising their rate, actually decreased the relation of their premium to the base rates and thus represents a reduction in the relative worth of their

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43 / The Board's reliance upon the notice to employees that premium rates were increased to maintain the same differential above the base rate (A. 342, ¶ 12) clearly does not establish that premium jobs are paid a base rate. If anything, this notice is an admission of a change upon a subject which was not proposed to the Union.

classification, which was also an issue that Parker was unsuccessful in resolving due to the Company's failure to provide wage information he requested. Furthermore, whether or not the increase to premium employees was an "adjustment", the Board did not dispute that the premium rates were unilaterally instituted and as such was an act clearly inimical to the process of good faith collective bargaining, particularly where as here it was coupled with the Company's failure to provide requested information on the subject of premium jobs. N.L.R.B. v. Katz, 369 U.S. 736, 82 S. Ct. 1107 (1962); N.L.R.B. v. C & C Plywood Corp., 385 U.S. 421, 431, 87 S. Ct. 559, 565 (1967); Industrial Union of Marine & Shipbuilding Wkrs. v. N.L.R.B., 320 F.2d 615, 620 (C.A.3, 1963); N.L.R.B. v. Generac Corporation, 354 F.2d 625, 628, (C.A. 7, 1965); N.L.R.B. v. United Nuclear Corporation, 381 F.2d 972, 977 (C.A. 10, 1967) (the layoff issue).

B. The Wage Increases Were Instituted for the Purpose of Encouraging Decertification and Undermining the Union and Were Therefore Unlawful Even Assuming Arguendo it was Agreed to by the Union.

The Board improperly restricted its consideration of this case solely to the allegation of unilateral action based upon the credibility of the witnesses. But paragraph 14 of the complaint alleged additional theories upon which a violation occurred, as follows:

> On or about June 6, 1966 Respondents [referred to as Company herein] granted the wage increases described above in paragraphs 12 and 13, to their employees at their Springdale, Arkansas, plants, without notification to, or bargaining with the Union, and also in order to undermine the Union and to encourage their employees to decertify the Union as their collective bargaining representative.
> (A. 342, ¶ 14, emphasis supplied.)

A finding by the Trial Examiner affirmed by the Board, that base rate wage increases were not unilateral did not decide all the allegations contained in paragraph 14 and the Board's complete failure to consider the allegations other than unilateral conduct, upon which its Trial Examiner made findings and conclusions, was a gross error.

Moreover, with respect to the allegation of unilateral conduct alone the Board considered only the evidence of whether the Union gave its consent and thus failed to heed the mandate of the Supreme Court in N.L.R.B. v. Insurance Agents' International Union, 361 U.S. 477, 506, 80 S. Ct. 419, 437 (1960):

> The state of mind with which the party charged with a refusal to bargain entered into and participated in the bargaining process is the ultimate issue upon which alone the Board must act in each case, and on the sufficiency of the whole record to justify its decision the courts must pass. (Emphasis supplied)

Manifestly, unilateral conduct can be a violation in itself and also evidence of bad faith. N.L.R.B. v. Southwestern Porcelain Steel Corporation, 317 F.2d 527, 531 (C.A. 10, 1963). Upon the following facts, received in evidence, it is clear that the Company entered the bargaining process with a desire to undermine the Union's bargaining status and encourage a decertification movement immediately upon the termination of the certification year, and that it used the wage proposal of May 17 and its ultimate institution on June 6, whether unilateral or bilateral, to carry out these unlawful designs.

On May 17, the first meeting after the expiration of the certification year, the Company proposed and the Union rejected the immediate institution of a base rate wage increase (A. 49, 50-53, 93, 132, 134-135). Gilker threatened the Union and carried out his threat by causing to be posted in the plant a copy of a letter he sent to Parker which objected to the Union's refusal to permit the Company to give its "deserving" employees a "fair and equitable" wage increase (A. 351, 92-93, 163-164, 166-167). Within less than one week a decertification movement began (A. 357-361, 14) and was linked to the Company's announced desire to grant wage increases (A. 37-40) 44 /. Superimposed upon these events were the Union's repeated requests for wage information (A. 134-135, 352, 354, 387, 388) the Company's failure to comply therewith except for supplying information which was inconsistent with its earlier proposals 45 / (A. 133-146),

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44 / An employee was asked to sign the petition "so we could get a raise" (A. 37) and she heard the personnel manager ask before the petition was circulated "when the election was going to come up for a vote" (A. 40).

45 / All the Company's wage proposals were offered for starting rate, grade 1 and grade 2 jobs (A. 373, 386). Shortly after May 17 Parker received only a part of the information he had been requesting since the beginning of bargaining (A. 134-135) and that information indicated grade 1, grade 2, grade 3 and prob. (apparently probationary) classifications (A. 390-397, 142-143). Despite Parker's earlier requests (A. 387) he never learned the basis for those classifications or the reason why they differed from earlier Company classifications (A. 136, 143).

and the Union's opposition to the proposed wage increases because inter alia it did not understand who it would affect until it could analyze the requested wage date (A. 146). The Union never received all the information it requested (A. 331).

These facts were admitted into evidence, and were not controverted by the Company and were so found by the Trial Examiner (A. 323, 331). particular, the Trial Examiner found:

> It should be borne in mind that the Company had never complied with the Union's repeated requests for information concerning the duties and responsibilities of the various job classifications within the Company's three grade levels.
>
> * * *
>
> Another factor contributing to my conclusion concerning the Company's bad faith in putting into effect the plant-wide wage increases on June 6 is the timing of the Company's action, about 2 weeks after certain employees started circulating Union reunciation papers, activity of which the Company was aware, and just after the expiration of the certification year.
>
> In view of the timing of the Company's grant of the plant-wide increase, and bearing in mind the fact that the Company had threatened at the May 17 meeting to post a notice blaming the Union for blocking a pay increase for the employees, a threat which the Company carried out when it posted on its bulletin board a copy of its May 17 letter to the Union, and the further fact that the Company in its notice of June 6 announcing the general increase in wage rates again faulted the Union for delaying other increases and improvements in Company benefits, I conclude that the Company's action in instituting plant-wide increases to maintain previously existing wage differentials was a deliberate effort on the part of the Company to discredit the Union in the eyes of the employees and to give encouragement and support to the movement to secure the revocation of the Union's bargaining authority.

> In reaching this conclusion I have fully considered the Company's contention that it was motivated solely by prudent business considerations in ordering the June 6 wage increases and not by any desire to undermine the Union. In support of this argument the Company asserts that it was experiencing very high turnover due to losing employees to higher paying competitors, and that as a result it was unable to operate its production lines efficiently. I do not doubt that high turnover was a factor in the Company's action on June 6. However, the whole sequence of events commencing on May 17, (which was almost exactly the end of the certification year) leads me to conclude that a significant factor behind the Company's action in granting the wage increases on June 6 was its desire to get rid of the Union.
> (A. 331-332)

Thus, the Trial Examiner concluded that the Company's action was motivated to undermine the Union's bargaining status and encourage the decertification movement and these conclusions were made totally apart from his findings with respect to the alleged unilateral conduct 46 /.

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46 / It is obvious that the Trial Examiner, unlike the Board, was mindful of the conjunctive allegations of paragraph 14 of the complaint as explained above. Immediately after making the above quoted findings, the Trial said "In any event . . ." the Company acted unilaterally with respect to premium rates (A. 332).

Moreover, it cannot be said that the General Counsel did not so intend to allege acts of bad faith other than unilateral conduct, in view of his assertions on the record:

> that the wage increase itself served as an impetus for the successful completion of the strike by employees to complete the [decertification] petition.
> (A. 20)

See also the General Counsel's authorization to issue the complaint (A. 419).

The only mention of these matters by the Board was to paraphrase paragraph 14 of the complaint and state as follows:

> In our opinion, there is nothing in the record to justify an inference that Respondent's action in granting an increase in the employees' base rate of pay was motivated by any reason other than its desire to halt the high turnover in its labor force it was experiencing due to losing employees to competitiors in the area who were paying higher wages.
> (A. 318, fn. 5, emphasis supplied)

In the face of the Trial Examiner's findings, which in the main were based upon the foregoing uncontroverted facts, the above-quoted finding represents the Board's absolute and total disregard for the record and the allegations contained in the complaint. In so finding, contrary to its Trial Examiner, the Board seriously violated the rules of judicial determination set forth by the Supreme Court in Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 496, 71 S.Ct. 456, 469 (1951):

> We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion.

See also: N.L.R.B. v. Hamilton Plastic Molding Company, 312 F.2d 723 (C.A. 6, 1963). In this case the Board cited no evidence to support its conclusion reversing the Trial Examiner while, as detailed hereinabove, the record abounds with uncontroverted facts which support the Trial Examiner's conclusions that the Company was motivated to undermine the Union's status and encourage the decertification movement.

The Company violated its bargaining obligation, as alleged, by the interplay of basically two techniques: (1) refused to supply the Union with requested wage information and thus prevented the Union from intelligently deciding upon the Company's wage proposal 47 / and (2) immediately after the expiration of the certification year, it announced to its employees its desire to increase wages and the Union's opposition thereto (A. 351). The Union was thus impaled on the horns of a dilemma. If the Union had agreed to the wage increase it publicly would have committed itself to the Company's position on base rates and premium designations without knowledge and of the facts/thereby seriously would have weakened its own bargaining position 48 /. If the Union had failed to agree to the Company's proposal it would have substantiated the Company's unjust announcement that the Union was opposed to wage increases and would have given further impetus to the decertification movement. Clearly these facts render the issue of unilateral conduct moot because

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47 / The Trial Examiner found that the Company "never revealed to the Union which wage rates were assigned to what operations. * * * This information was essential to any intelligent consideration of wage levels at the Company's plant." (A. 331).

48 /Moreover, because of the posting of Gilker's May 17 letter, the Union would always be unjustly blamed for delaying the wage increase, even if had given its approval, because the Company had already taken exclusive credit for increased wages.

the Company had discredited the Union without cause regardless of the position it took. The primary objective of the National Labor Relations Act is to require an employer "to recognize a union selected by his employees as their representative" and Section 8 (a)(5) of the Act imposes upon the employer an "obligation to confer with union in an effort to arrive at the terms of an agreement," N.L.R.B. v. Insurance Agents' International Union, 361 U.S. 477, 484; 80 S.Ct. 419, 424 (1960). Thus, it is the "effort to arrive at the terms of an agreement" or as this Court has termed "to make a good faith effort to reach an accord with the Union." (United Steelworkers of America, AFL-CIO v. N.L.R.B., 389 F. 2d 295, 298) which is the standard by which an alleged violation of Section 8 (a)(5) must be measured.

There can be no question that the Company's deliberate failure to comply with the Union's request for wage data is a violation of the Act. N.L.R.B. v. Acme Industrial Co., 385 U.S. 432, 434-436, 87 S. Ct. 565, 568 (1967); N.L.R.B. v. Truitt Manufacturing Co., 351 U.S. 149, 76 S. Ct. 753 (1956); Fitzgerald Mills Corporation, 133 NLRB 877, 878-879, enforced 313 F. 2d 260 (C.A. 2, 1962) certiorari denied, 375 U.S. 834, 84 S.Ct. 47 (1963); Kohler Co., 128 NLRB 1062, 1073, enforced and modified on other grounds, 300 F. 2d 699 (C.A.D.C., 1962). Although no independent violation in this regard was alleged, nevertheless no real determination of the issues raised by the allegations in the complaint can be made without a consideration

of this evidence. The Company's failure to supply the requested wage information establishes that it and not the Union as unjustly accused, was to blame in delaying negotiations. The Supreme Court said in Brooks v. National Labor Relations Board, 348 U.S. 96, 100, 75 S. Ct. 176, 179 (1954):

> It is scarcely conducive to bargaining in good faith for an employer to know that, if he dillydallies or subtly undermines, union strength may erode and thereby relieve him of his statutory duties at any time.

Thus, solely upon the Company's refusal to supply wage information, it violated the Act as alleged, i.e., undermining the Union's status, and the Board erred by ignoring that allegation and the facts found by the Trial Examiner.

The other Company ploy to undermine the Union's status, Gilker's May 17 ammouncement to the employees that the Union was preventing their receiving a wage increase, is equally unlawful in the context of these events. In Medo Photo Supply Corp. v. N.L.R.B. 321 U.S. 678, 64 S. Ct. 830 (1944) the Supreme Court said [321 U.S. at 683, 64 S.Ct. at 833]:

> . . . the negotiations by petitioner [the employer] for wage increases with anyone other than the Union, the designated representative of the employees, was an unfair labor practice.

Significantly in the Medo case it was the employees who inititated the negotiations with the employer seeking wage increases (321 U.S. at 685 fn. 3, 64 S.Ct. at 834 fn. 3). Thus the facts here are a fortiori to the Medo case because here it was the Company, through Gilker, who announced to the employees a desire to grant "fair and equitable" wage increases.

An announcement like the one here, has long been held an unfair labor practice and evidence of bad faith. In Inland Lime & Stone Co. v. National Labor Relations Board, 119 F. 2d 20 (C.A. 7, 1941) the Court said [at page 22]:

> * * * This action [Company announcement to employees of a subject under negotiation] was more than merely tactless. It evidenced a willful and deliberate contempt for the whole plan of collective bargaining. It was fairly inferable that the employer, by this action, intended to humiliate the Union representatives and discredit them in the eyes of their fellow employees. It reflected on the alleged good faith of petitioner's recognition of the Union as a bargaining agent. * * *

In N.L.R.B. v. Fitzgerald Mills Corporation, 313 F. 2d 260 (C.A. 2, 1962) cert. denied 375 U.S. 834, 84 S.Ct. 47 (1963), the Court (313 F. 2d at 268) found similar notices as a "calculated attempt to undermine Union prestige" and "evidence of refusal to bargain in good faith." See also: National Labor Relations Board v. Century Cement Mfg. Co., Inc., 208 F. 2d 84, 86 (C.A. 2, 1953). The later announcement of the wage increases on June 6 affirmatively establishes the Company's dishonest claim and unlawful motive. The notice states in part as follows:

> Many other increases and improvements in company benefits have been proposed to the Union and would have been already placed into effect except for their delays and stalling tactics.
> (A. 342, ¶ 12; admitted by the Company, A. 349, ¶ IX).

The refusal to supply requested wage information in itself establishes the untruthfulness of this claim 49 / and is yet another fact in the record upon which an inference of bad faith must be made 50 /.

Upon the unholy interplay of the May 17 announcement, simultaneously depriving the Union from requested wage information and the dishonest June 6 announcement, the Company violated the act as alleged, even if we were to assume arguendo that the Union consented to the base rate wage increase 51 /. No proper determination of this case can be made without considering all the facts preceding the Union's alleged assent. Manifestly, the Union's assent to the base rate wage increase is meaningless if it was forced into giving its assent by the Company's unfair labor practices. National Labor Relations Board v. Andrew Jergens Co. 175 F. 2d 130, 136 (C.A. 9, 1949) cert. denied 338 U.S. 827, 70 S. Ct. 76; Industrial Union of Marine & Shipbuilding Workers v.

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49 / Moreover the evidence of Gilker's rejection of agreements reached by his client and his reversion to the Company's six month old status quo proposals (see supra pp 30-32 , in the record as an offer of proof) further establishes the untruthfulness of the Company's notice.

50 / The Supreme Court held in N.L.R.B. v. Truitt Mfg. Co., 351 U. S. 149, 152; 76 S. Ct. 753, 755-756 (1956), "Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims".

51 / Even upon this assumption the record is clear, as found by the Trial Examiner, that no consent was given for the premium rate increases. (See argument supra pp 40-43).

N.L.R.B. , 320 F. 2d 615, 621 (C.A. 3, 1963) cert. denied 375 U.S. 984, 84 S.Ct. 516; remanding Bethlehem Steel Company, 133 NLRB 1347, supplemental decision 136 NLRB 1500, upon remand, Bethlehem Steel Company 147 NLRB 977; N.L.R.B. v. Yutana Barge Lines, Inc., 315 F. 2d 524, 529-530 (C.A. 9, 1963); N.L.R.B. v. Herman Sausage Co., 275 F. 2d 229, 234 (C.A. 5, 1960); Vanette Hosiery Mills, 114 NLRB 1107 1126 52 / or if it gave its assent but was deprived of essential information upon which to negotiate the issue. N.L.R.B. v. United Nuclear Corporation, 381 F. 2d 972, 977 (the lay off issue) (C.A. 10, 1967).

The Board's reliance upon the Company's defense that the wage increases were motivated solely because of economic considerations, aside from being diametrically contrary to its Trial Examiner's finding, is also unfounded in the record. The evidence of high employee turnover consists solely of the Company's president, Tyson, testifying that he memorized certain figures shown to him at the hearing which allegedly represented a 25% turnover in his employee complement for six months preceding June 6 (A. 212-216, 417-418). This testimony, based upon documents prepared exclusively for trial is not the best evidence and should have been rejected. 53 / Moreover, the record does not contain any

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52 / The cases set forth above enunciate the proposition that an employer may not defend its unilateral conduct on the grounds that an impasse was reached where the context of events establish that the employer created the impasse by unlawful conduct. Thus, the cases are analogous here where the Company by its prior unlawful conduct, undermined the Union's bargaining status and coerced its involuntary consent to wage increases in the face of an illegally encouraged decertification movement.

53 / National Labor Relations Board v. Columbian Carbon Co., 177 F. 2d 1003, 1005 (C.A. 10, 1949). The Union raised this objection which was erroneously overruled by the Trial Examiner (A. 212-214).

evidence of the rate of turnover for the year 1965, yet we know, according to Tyson's testimony, that a problem of employee turnover always existed (A. 240).

Further indicating the sham like nature of the Company's defense is Tyson's testimony ". . . that we work more hours, and we believe in the concept of total take home pay" (A. 235, 242), which is just a tactful way of explaining a low hourly rate policy. The record is clear that Tysons was paying less than its competitors prior to the June 6 increase (A. 234-235) and continued paying less after the increase (A. 218). Thus, it could hardly contend that the wage increase was motivated by a desire to become competitive and thereby reduce turnover. Upon a failure by the Board to cite any basis for reversing the Trial Examiner's finding of bad faith motivation, which findings were based upon uncontroverted facts in the record, and the patent inconsistencies in the Company's defense, it is clear that the Board's finding must be reversed. Because the Trial Examiner's findings are predicated upon undenied facts the Court can find that the Company's conduct in instituting the June 6 wage increases was in bad faith whether instituted with or without the Union's consent and thereby violative of Section 8(a)(5) of the Act.

CONCLUSION

Upon the basis of the foregoing, we submit that the Union's petition to review and set aside the Board's order should be granted. There is uncontroverted evidence in the record upon which the Board should have found, had it applied controlling principles of law, that the Company bargained in bad faith as alleged in the complaint. Based upon those facts and the controlling principles cited herein the Court should so find.

At a bare minimum, the Court should remand this matter for the purpose of affording the Union, as the charging party, an opportunity to be fully heard upon all the allegations in the complaint. The facts which the Union seeks to introduce, now in the record as an offer of proof, will establish beyond any doubt the Company's bad faith bargaining conduct as alleged.

Respectfully submitted,

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No. 22,393

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, and FOOD HANDLERS LOCAL 425, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

On Petition To Review an Order of the National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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United States Court of Appeals
for the District of Columbia Circuit
FILED MAY 8 1969
Nathan J. Paulson
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*International Union of Electrical, Radio and Machine Workers, AFL-CIO v. N.L.R.B., 110 App. D.C. 91, 289 F.2d 757 (1960)	13

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22, 393

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, and FOOD HANDLERS LOCAL 425, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

On Petition To Review an Order of the National Labor Relations Board

---

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ISSUES PRESENTED FOR REVIEW

The issues presented, as stipulated by the parties in the prehearing conference stipulation (A. 315),[1] are:

1. Whether the Board erred in refusing to admit evidence offered by the Charging Parties.

2. Whether the Board erred in failing to find that the Company violated Section 8(a)(1), (3) and (5) of the Act.

---

[1] "A." references are to the printed Appendix. Where a semicolon appears in a list of references, those numbers preceding it are to the Board's findings and those following it are to supporting evidence.

In accordance with Rule 8(d) of the General Rules of this Court, the Board states that this case has not previously been before the Court.

COUNTERSTATEMENT OF THE CASE

This case is before the Court on the petition of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, and its Food Handlers Local 425 (Union) to review and set aside an order of the National Labor Relations Board issued under Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*). The Board's Decision and Order dismissing the complaint in its entirety issued on September 10, 1968, and is reported at 172 NLRB No. 224. This Court has jurisdiction over the proceedings under Section 10(f) of the Act.

I. THE BOARD'S FINDINGS OF FACT

In May of 1965 the Board certified Food Handlers Local 425, AFL-CIO, affiliated with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, hereinafter called the Union, as the exclusive bargaining representative of all production and maintenance employees of Tyson's Poultry, Inc. and Arkansas Animal Foods, Inc. at their plants at Springdale, Arkansas (A. 339-350). In October 1965, the Company gave the Union a complete written proposal at a bargaining meeting. In March 1966, the Company gave the Union a revised proposal on wages, offering $1.37 per hour for grade 1 employees and $1.40 per hour for grade 2 employees (A. 322; 117). A counterproposal with a base rate of $1.46 per hour, with an additional increase in the second and third years of the contract, was offered by the Union (*ibid.*).

On April 26, 1966, Company President Don Tyson met with T. J. Lloyd, president of the Amalgamated and Jasper C. Rose, vice president of the Amalgamated, at the International Union's office in Chicago (A. 322; 117, 118). Tyson counterproposed a $1.41 base rate effective May 1, 1966, $1.44 base rate effective February 1, 1967, $1.52 base rate effective August 1, 1967, $1.63 base rate effective February 1, 1968, and $1.67 base rate effective August 1, 1968. The Union adhered to its demand for a first-step increase in the base rate of $1.46. No agreement on wages was reached (*ibid.*). The next bargaining meeting was held May 5 at the Hilton Inn in Kansas City, Missouri. Representing the Company were President Tyson and Plant Manager Buddy Wray. Among those representing the Union were Secretary-Treasurer Parker and Amalgamated Vice President Rose. The Company adhered to its previous wage offer. The Union counterproposed a $1.41 base rate, to be raised to $1.46 per hour on September 1, 1966, provided that agreement was reached on an entire contract. No such agreement was reached (A. 322, 118).

On May 17, in Fort Smith, Arkansas, Tyson met with Parker and Rose in the office of his attorney, James A. Gilker. The Company renewed its offer of a $1.41 base rate which was rejected by the Union. The Company stated that it wanted to put the $1.41 increase into effect immediately. The Union refused to agree, Parker stating that the offer was not clear and the Union had not been given information which it had requested concerning the duties and classification of employees and as to premium jobs (A. 322; 119, 51). Gilker stated that the Company was going to post a notice stating that the Union was refusing to permit the Company to put into effect a 5-cents per hour increase for the men and a 9-cents per hour increase for the women (A. 322-323; 92-93).

On May 17, the Company sent the Union a letter stating the Company's desire to place the $1.41 base rate into effect immediately. The Company posted a copy of this letter on its bulletin board about this time (A. 323; 163, 166). In the letter, the Company attributed the employees' failure to receive a lesser increase many months earlier to the Union's objections and expressed the hope that the Union "will take no action which might put in question the Company's right to install this wage adjustment immediately" (A. 323; 351). On May 19, the Union sent the Company a letter requesting that it defer putting the wage increase into effect pending the outcome of a bargaining meeting scheduled for the coming week (A. 323; 351). In a letter to the Company on May 24, the Union protested the Company's action in posting on its bulletin board the Company letter of May 17. In the May 24 letter, the Union renewed the request made in its April 6 letter for a statement of the requirements, duties and functions of the employees in each of its job classifications (A. 323; 354).

Also on May 24, employee Edith Douthit and three of her fellow employees started soliciting from other employees signatures on papers containing the following heading: "WE THE EMPLOYEES OF TYSON'S PROCESSING PLANT AT SPRINGDALE, ARKANSAS NO LONGER WISH TO BE REPRESENTED BY LOCAL 425 MEAT CUTTERS UNION." (A. 323; 358). Thereafter, Personnel Manager H. D. Knight was made aware of the circulation of a petition outside the plants "to get rid of the Union" (A. 331; 164-165).

A bargaining meeting was held at the Hilton Inn in Kansas City, Missouri on May 27. Tyson, Gilker, Parker and Rose attended this meeting. Gilker again asked to put the $1.41 base rate into effect (A. 323;

54). Parker accused the Company of already having posted a notice regarding the $1.41 base rate, to which Gilker replied that the letter had been taken down. Parker said that he could not agree to the Company's putting the increased base rate into effect, explaining that there was a problem of retroactive pay, that no agreement had been reached on premium jobs, and that the Union was not satisfied with the employee data furnished by the Company with its letter of May 17 (A. 323; 54).

On June 1, employee Edith Douthit mailed to the Little Rock, Arkansas Resident Office of the Board the original signed Union-renunciation papers which had been circulated among the employees from May 24 through May 30. It appears that 139 signatures were attached (A. 324, 332; 15).

During a telephone call on June 6, Gilker stated that the Company wanted to put the $1.41 base rate into effect immediately. Rose stated that this was agreeable to him and to go ahead (A. 324, 328; 279). That day the Company posted the following notice:

> Effective Monday, June 6, 1966, the following base rate will be in effect:
>
> Starting rate ..... $1.35 per hour
> After 30 working days ..... $1.41 per hour
>
> All present premium rates will be increased to maintain their present differential above base rate.
>
> Many other increases and improvements in company benefits have been proposed to the Union and would have been already placed into effect except for their delays and stalling tactics.

About a month later, the petition to decertify the Union was filed with the Board's Regional Office in Memphis, Tennessee. Two weeks thereafter, Local 425 filed a charge with the Regional Office alleging that

the Company engaged in unfair labor practices in violation of Section 8(a)(1), (2), (3) and (5) of the Act by assisting in the circulation of the Union-renunciation papers, by discriminating against returning strikers, and by refusing to bargain collectively in good faith with the Union since on or about February 1, 1966 (A. 325; 336). The Amalgamated filed its charge with the Regional Office alleging substantially the same violations as contained in the Union's charge and added allegations based upon unilateral action with respect to base and other rates of pay in September 1966 (A. 325; 337). The Regional Director notified the parties that he was refusing to issue a complaint on the charges filed. The Union and the Amalgamated appealed to the General Counsel from the Regional Director's ruling.

In November the Regional Director issued his Decision and Direction of Election based on the decertification petition. The election was held December 1 with the Union losing 133 to 43, with 7 challenged ballots.

On June 20, 1967, the General Counsel sustained the refusal of the Regional Director to issue a complaint based on the charges filed by the Local and the Amalgamated, except with respect to allegations "that the wage increase (of June 6, 1966) not only constituted unlawful unilateral action but was motivated by a desire to undermine the Union and give impetus to the decertification movement, and . . . reflected the absence of a good-faith effort by the Company to reach agreement with the Union" (A. 419-420). Thereafter, the Regional Director issued the consolidated complaint alleging that the Company put into effect the wage increase set forth in the notice of June 6 "without notification to, or bargaining with, the Union, and also in order to undermine the Union and to encourage their employees to decertify the Union as their collective-

bargaining representative," in violation of Section 8(a)(1), (3) and (5) of the Act (A. 339).

II. THE BOARD'S CONCLUSION AND ORDER

On the foregoing facts, the Board found that Tyson's had not violated Section 8(a)(1), (3) and (5) because the wage grant was neither unilateral nor motivated by anti-union considerations. The complaint, therefore, was dismissed in its entirety.[2]

ARGUMENT

I. THE BOARD PROPERLY CONCLUDED THAT THE PREPONDERANCE OF THE RECORD EVIDENCE FAILED TO SHOW THAT THE COMPANY VIOLATED SECTION 8(a)(1), (3) AND (5) OF THE ACT

A. Introduction

Where the Board finds that an employer's conduct did not interfere with protected rights, the Board's determination will be upheld unless it has "no rational basis" (*International Woodworkers v. N.L.R.B.*, 105 App. D.C. 37, 39, 263 F.2d 483, 485 (1959); *Amalgamated Clothing Workers v. N.L.R.B.*, 124 App. D.C. 365, 378, 365 F.2d 898, 911 (1966)), or unless "the evidence required the Board to uphold the claim" that the statute was violated (*Amalgamated Clothing Workers v. N.L.R.B.*, 118 App. D.C. 191, 334 F.2d 581 (1964)) because the only inference reasonably to be drawn from the record is that respondent violated the Act.

As the Counterstatement (*supra*, pp. 2-5) makes clear, all the conduct *alleged* as unlawful—that is, the area in which the Board and the

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[2] In so holding, the Board reversed the Trial Examiner, who had found that the Union had agreed to only part of the wage increase and thus the granting of that part to which it had not consented was violative of Section 8(a)(5) and (1).

Trial Examiner differed—is equivocal. Thus, the legality of the wage increase depends on the scope of the parties' agreement and, under the alternative theory, on the Company's motivation (see *infra*, pp. 9-12). Accordingly, any finding of a refusal to bargain or discrimination depends on additional factual inferences from the evidence. Obviously, these are "matters where the presumptively broader gauge and experience of the Board have a meaningful role" and it is "they who have been given statutory responsibility." *Oil, Chemical and Atomic Workers v. N.L.R.B.*, 124 App. D.C. 113, 115-116, 362 F.2d 943, 946 (1966). Accord: *American Federation of Television and Radio Artists v. N.L.R.B.*, 129 App. D.C. 399, 395 F.2d 622, 628 (1968); *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 493-494 (1951); *F.C.C. v. Allentown Broadcasting Corp.*, 349 U.S. 358, 363-364 (1955); *Wheeler v. N.L.R.B.*, 114 App. D.C. 255, 258, 314 F.2d 260, 263 (1963). Accordingly, the Trial Examiner's findings are not entitled to special weight.

With respect to the Union's effort to litigate matters not alleged by the General Counsel (see *infra*, pp. 12-17)—which both the Trial Examiner and the Board rejected—the considerations are those of policy concerning the relationship between the Board and the General Counsel, as well as the interpretation of the Act in this respect. To prevail, the Union would have to establish that in giving effect to Section 3(d) of the Act the Board abused its discretion. Accordingly, all the Union's contentions require reversal of the Board in an area of special competence, and we submit that the Union has not carried the burden of showing that the Board's determinations have "no rational basis."

B. The alleged violations

Counsel for the General Counsel alleged that the wage increase granted on June 6 was unlawful in that it violated Section 8(a)(1), (3) and (5) of the Act, either because the Union had not agreed to it—and hence the raise was a unilateral change of a condition of employment—or because the Company was motivated by a desire to undermine the Union. He sought to establish the unilateral nature of the Company's action by testimony of Amalgamated Vice President Rose as to the absence of such an agreement (A. 329). The Trial Examiner, however, credited the testimony of Company Counsel Gilker and President Tyson that Rose had failed to appear for a scheduled bargaining session and when reached by telephone, had agreed to the Company's raising the base rate to $1.41 (A. 328-330). The Examiner further found that since Rose was an important spokesman for the Union in these negotiations and had set up the meeting in question, the Company was justified in accepting this representation as the Union's position (A. 330). The Board adopted these findings, which turn almost entirely on a credibility determination. As this Court has held, the credibility of witnesses is a matter for Board determination and not for a reviewing court. *United Steelworkers of America, AFL-CIO v. N.L.R.B.*, ___ App. D.C. ___, 405 F.2d 1379 (1968); *Joy Silk Mills, Inc. v. N.L.R.B.*, 87 App. D.C. 360, 185 F.2d 732 (1950), cert. denied, 341 U.S. 914.

Given this credibility determination, the possibility of finding an unlawful unilateral action depends on a determination of whether the increase of "premium rates to maintain their present differential above base rate" followed from the agreement to raise the base rate. The Board

determined that it did (A. 319), noting the form of the Company's announcement and the absence of any "showing that the increase in pay for employees working on premium pay amounted to anything more than an adjustment in their base rate which was the same as for the non-premium employees."[3] Certainly, the existence of a "base rate" and "premium rate" wage structure implies such a relationship.[4] Moreover, the Union relies (Union Br. 42), not on evidence to the contrary, but on the absence of direct evidence on the issue. Since the Union's contention must be that the preponderance of evidence requires reversal of the Board's finding (see *supra*, p. 7), however, it clearly cannot rely on the absence of evidence in this respect.

There remains the General Counsel's allegation that the Company put the wage increase into effect "in order to undermine the Union and encourage [the] employees to decertify the Union as their collective-bargaining representative." With respect to this issue, the Trial Examiner adverted (A. 332) to the Company's assertion that "it was motivated solely by prudent business considerations"—that is, a response "to losing employees to higher paying competitors" (A. 211-213, 216-219; 417)—and assumed that "high turnover was a factor in the Company's action." Nevertheless, he concluded (A. 332) that "a desire to get rid of the Union" was also "a significant factor," and that the Company's granting of the wage increases therefore violated Section 8(a)(5) of the Act. The

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[3]The Trial Examiner assumed that the two raises were separable (see A. 331).

[4]Cf. *N.L.R.B. v. Huttig Sash & Door Co.*, 377 F.2d 964, 966 (C.A. 8, 1967). See also Webster's Third New International Dictionary, which defines a "premium system" as one "in which the workmen's hourly rate is guaranteed and a premium (as a percentage of the hourly wage) is paid for doing the work in less than the standard time specified." (p. 1789).

Board found, however, that "there is nothing in the record to justify an inference that [the Company's] action in granting an increase in the base rate of pay was motivated by any reason other than its desire to halt the high turnover in its work force it was experiencing due to losing employees to competitors in the area who were paying higher wages," and hence the wage increase did not violate either Section 8(a)(5) or 8(a)(3) (A. 318 n. 5). Cf. *N.L.R.B. v. Gotham Industries, Inc.*, 406 F.2d 1306 (C.A. 1, 1969).

It is undisputed that the Company had not given a wage increase through more than a year of bargaining. Accordingly, while the Company's announced interest in granting the wage increase coincided with the end of the certification year, it also coincided with the Company's increasing need for such action and with the Union's indication, at the immediately preceding bargaining session, that $1.41 would be acceptable as the first step, with disagreement shifting to the timing and amount of subsequent steps (A. 322). As noted above, the Union ultimately agreed to $1.41 as the first step. While the initial raise announcement may have given impetus to the subsequent employee-sponsored decertification petition, such a consequential effect does not directly impugn the Company's avowed motive for its action. Finally, the Company's failure to provide job information (A. 331) did not impede bargaining over wages; bargaining continued with the base rate as the real point in issue (A. 322-323). Indeed, the significance which the Trial Examiner gives to the Company's failure to provide this information (*ibid.*) apparently is directly related to his view, rejected by the Board (see, *supra*, p. 10) that the raise in the base rate and a "general increase" which included premium-rate employees (A. 331) were entirely separate matters.

The above factors, on which the Union, like the Trial Examiner, principally relies, establish at most that a finding of unlawful motivation might reasonably be made on this record. It is well settled, however, that a court should not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. N.L.R.B., supra,* 340 U.S. at 488; *International Woodworkers v. N.L.R.B.*, 104 App. D.C. 344, 345, 262 F.2d 233, 234 (1958).

C. The Board properly declined to consider other issues raised by the Union

The Union's principal contention (Union Br. 20-39) is that it was improperly denied the right to litigate additional issues. The general principles governing this question are not in dispute. Thus, the Union, as the charging party, was entitled to participate "in the hearings as a 'party'" (*Auto Workers v. Scofield,* 382 U.S. 205, 219 (1965)). This includes the right to introduce evidence which is not "irrelevant, immaterial or unduly repetitious" (*Spector Freight System, Inc.,* 141 NLRB 1110, 1111 (1963)). Of course, the standard of relevance is the complaint, and under Section 3(d) of the Act, the General Counsel has "final authority, on behalf of the Board, in respect of the . . . issuance of complaints under Section 10."[5] As a necessary corollary of the General Counsel's "discretion" to defer action on a charge—that is, to decline to issue a complaint—(*Vaca*

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[5] "Section 3(d) of the Act effected an important change over the earlier Wagner Act. It was designed to separate the prosecuting from the adjudicating function, to place the former in the General Counsel, and to make him an independent official appointed by the President and confirmed by the Senate for a term of years. See H. R. Rep. No. 245, 80th Cong., 1st Sess. 26; H. R. Rep. No. 510, 80th Cong., 1st Sess. 37; statement of Senator Taft, 93 Cong. Rec. 6859." *Lewis v. N.L.R.B.*, 357 U.S. 10, 16 n. 10 (1958).

v. Sipes, 386 U.S. 171, 182 (1967); *Division 1267, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Ordman*, 116 App. D.C. 7, 320 F.2d 729 (1963)), this Court and other courts have recognized that the General Counsel may issue a complaint alleging specific violations on a specific theory and decline to issue a complaint on other allegations in the same charge or to try them on another theory. Thus, as this Court observed in *United Steelworkers of America v. N.L.R.B.*, ___App. D.C. ___, 393 F.2d 661 (1968), "The Union's claim that the Board erred in refusing to allow it to expand the scope of the litigation over the objection of the General Counsel is without merit." See also, *Int'l. Union of Electrical, Radio and Machine Workers v. N.L.R.B.*, 110 App. D.C. 91, 289 F.2d 757 (1960); *Texaco, Inc. v. N.L.R.B.*, ___ F.2d ___, n. 14 (C.A. 5, No. 25,502, March 3, 1969, 70 LRRM 3045); *Piasecki Aircraft Corporation v. N.L.R.B.*, 280 F.2d 575 (C.A. 3, 1960), cert. denied, 364 U.S. 933; ("The decision as to the scope of the complaint is the General Counsel's") *Wellington Mill Division, West Point Mfg. Co. v. N.L.R.B.*, 330 F.2d 579 (C.A. 4, 1964), and other cases cited by the Board (A. 319, n. 7).

The Union does not appear to quarrel with this line of authority. Rather, it seeks to show either that the complaint in fact alleged an additional violation—that is, a general refusal to bargain in good faith, as opposed to the violations discussed above—or that the violation alleged in the complaint made relevant the evidence which the Union proffered. As we show below, neither contention has merit.

1. *The scope of the complaint*

The Union's unfair labor practice charge (A. 325; 336) had alleged, *inter alia*, that the Company violated Section 8(a)(1), (2), (3) and (5) of the Act by assisting in the circulation of a petition by which the employees renounced the Union, by discriminating against returning strikers, and by refusing to bargain collectively in good faith (A. 325). After the Regional Director, acting on behalf of the General Counsel, declined to issue a complaint, the Union appealed this decision to the General Counsel.[6] The General Counsel authorized a complaint based on the wage increase of June 6, 1966, adding (A. 419-420):

> With respect to the remaining allegations, however, insufficient basis was deemed to exist for further proceedings. It was noted that there was no evidence that the Company had unlawfully interrogated employees, and that the Union's own witnesses failed to corroborate its contentions that the Company had threatened or assigned more arduous tasks to returning strikers, and there was no credible evidence that the Company had sponsored or assisted in the circulation of the decertification petition by any conduct other than that noted above.

In answer to the Union's request that dismissal of the other charges be reconsidered, the General Counsel reiterated that "allegations other than those immediately related to the June 6 wage increase" could not be litigated within the complaint as drawn and refused to amend the complaint (A. 421).

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[6]Acting on behalf of the Board, the Regional Director thereupon proceeded with the representation case, and ultimately held the election. Since that action has not resulted in a final order within the contemplation of Section 10 of the Act, it is not before this Court for review. See, *A.F.L. v. N.L.R.B.*, 308 U.S. 401 (1940), affirming 70 App. D.C. 62, 103 F.2d 933 (1939).

The complaint as drawn, after alleging in paragraphs 13 and 14 that the wage increase of June 6 occurred and was a violation, added as paragraph 15:

> Commencing on or about June 6, 1966, and at all times thereafter, [the Company] negotiated with the Union in bad faith and with no intention of entering into any final or binding collective-bargaining agreement.

At the hearing, the counsel for the General Counsel made clear that this paragraph was conclusionary and did not constitute an expansion of the issues beyond those authorized by the General Counsel and alleged by the earlier paragraphs (A. 326; 75). We submit that, on this record, the Union's assertion (Br. 22-27) that it was misled by paragraph 15 into believing that the hearing would have a broader scope is unfounded. Rather, both the correspondence with respect to the complaint and the statement of position by the General Counsel made clear what issues would be tried.

The cases cited by the Union (Union Br. 23, 26-27) require, not a particular form of pleading, but actual notice necessary to secure a hearing "to the fullness of degree required by justice and the law." *National Broadcasting Company v. F.C.C.*, 124 App. D.C. 116, 123, 362 F.2d 946, 953 (1966). Since the General Counsel's intent as to the scope of the complaint was made clear in ample time to put all parties on notice as to the issues which would be tried, no possibility of prejudice or surprise is apparent and the Union's argument that the language of the complaint should be controlling does not suggest any such possibility. See *National Air Lines v. C.A.B.*, 112 App. D.C. 119, 122, 300 F.2d 711, 714 (1962), and cases cited; *N.L.R.B. v. Yale & Towne Mfg. Co.*, 114 F.2d 376, 377, 379 (C.A. 2, 1940). Cf. *Consolidated Edison Corp. v. N.L.R.B.*, 305 U.S.

197, 228 (1938); *N.L.R.B. v. Remington Rand, Inc.*, 94 F.2d 862, 873 (C.A. 2, 1938), cert. denied, 304 U.S. 576.

2. *Evidence of other violations*

The Union also suggests that even if it was estopped from alleging additional violations, it could have offered much of the same evidence for purposes which were relevant to the complaint as narrowly interpreted, but it was denied this right. The Trial Examiner's rulings cited by the Union (Union Br. 24) do not have this effect, however. They simply limit the Union to the General Counsel's *theory*, not his evidence, and hence these rulings do not, as the Union asserts, ignore "the general principles of relevancy and materiality" (*ibid.*). Moreover, the Trial Examiner went further and expressly advised the Union (A. 25, see also 194):

> In my opinion a Charging Party is entitled to adduce evidence which is conceivably within the theory of the Complaint, but I do not think a Charging Party is entitled to adduce evidence which is inconsistent with the Complaint.

When the issue to be tried is narrowed, however, the scope of *material* evidence is also narrowed. Moreover, when evidence bears only tangentially on the point at issue but is probative as to an issue which the General Counsel did *not* choose to litigate, admitting the evidence opens the door for an assertion that the other issue was, in fact, "fully litigated" as well.[7] In addition, for the most part, this evidence was apparently tendered in support of the *Union's* theory—that is, to establish separate violations, not to support the limited violation alleged by the General Counsel (A. 18, 21, 23-24, 199-200, 77-84, 86-92, 93-97, 149, 152, 177). The Examiner

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[7] Cf. *United Packinghouse Food and Allied Workers Int'l. Union, AFL-CIO v. N.L.R.B.*, ___ App. D.C. ___, ___ F.2d ___ (Nos. 21,627 and 21,825, February 7, 1969, 70 LRRM 2489, 2494, n. 12).

admitted the evidence which was strictly relevant and clearly material with respect to the issue being tried, however; the excluded evidence lacks not only pointed relevancy, but also clear materiality, because it is either equivocal, remote in time, or cumulative with respect to the wage increase on June 6. Accordingly, we submit that the Examiner's exclusionary rulings did not constitute an abuse of discretion, as he sought to allow the charging party a reasonable opportunity to add material evidence—over the General Counsel's objection (A. 137-139), where necessary—without improperly expanding the issues alleged. Cf. *E. Anthony & Sons v. N.L.R.B.*, 82 App. D.C. 249, 256, 163 F.2d 22, 29 (1947), cert. denied, 332 U.S. 773; *N.L.R.B. v. Phaostron Instrument and Electronic Co.*, 344 F.2d 855, 859 (C.A. 9, 1965).

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for review should be denied.

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April 1969.

No. 22,393

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, AND FOOD HANDLERS LOCAL 425

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Review an Order of The National Labor Relations Board

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PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR MODIFICATION OF OPINION

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 28 1959

Nathan J. Paulson
CLERK

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PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR MODIFICATION OF OPINION

For the reasons set forth below, the National Labor Relations Board, respondent herein, respectfully petitions for modification of the following portion of the opinion entered in this case on October 17, 1969, by a panel of this Court (Wright, McGowan and Leventhal, Circuit Judges) (sl. op. p. 3, n. 3):

> At oral argument before us, it was represented by counsel for the Board that the General Counsel's power to amend a complaint is limited to the correction or clarification of ambiguities; it does not, so it was said, extend to alterations of substance, for which he must seek the prior authority of the Board. Since the General Counsel took no initiative of any kind in response to the Trial Examiner's suggestion, we have no occasion to express an opinion as to whether this was a case of the one or the other. Our point is only that it did not contribute to the effective hearing and resolution of this case for the General Counsel to stand solely on his observation that he regarded Paragraph 15 as simply stating a legal conclusion.

The Board requests the substitution of the following, which more accurately reflects the actual practice under the Board's rules and regulations:[1]

> Under the Board's Rules and Regulations (29 C.F.R. 102.17), the General Counsel may unilaterally amend a complaint prior to the opening of the hearing. After the hearing has opened, he may amend the complaint only upon motion to the Trial Examiner or the Board. Since the General Counsel took no initiative of any kind in response to the Trial Examiner's suggestion, we have

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[1] The Board Rules and Regulations, Series 8 (29 C.F.R.), Section 102.17, provides:

> *Amendment.*—Any such complaint may be amended upon such terms as may be deemed just, prior to the hearing, by the regional director issuing the complaint; at the hearing and until the case has been transferred to the Board pursuant to section 102.45, upon motion, by the trial examiner designated to conduct the hearing; and after the case has been transferred to the Board pursuant to section 102.45, at any time prior to the issuance of an order based thereon, upon motion, by the Board.

no occasion to express an opinion on whether a formal motion was required. Our point is only that it did not contribute to the effective hearing and resolution of this case for the General Counsel to stand solely on his observation that he regarded Paragraph 15 as simply stating a legal conclusion.

WHEREFORE, it is respectfully requested that the Court modify its opinion as set forth above.

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November 1969.

RESPONSE IN OPPOSITION TO PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR MODIFICATION OF OPINION.

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 6 1969

Nathan J. Paulson
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In the

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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ON PETITION TO REVIEW AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

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In the

United States Court of Appeals

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AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, AND FOOD HANDLERS LOCAL 425,

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ON PETITION TO REVIEW AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

RESPONSE IN OPPOSITION TO PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR MODIFICATION OF OPINION.

The Board, in its petition for modification of the Court's opinion, seeks to delete therefrom that part of footnote three where the Court did no more than note certain remarks made by the Board's counsel in oral argument. The Board's petition does not deny that said remarks were made and offers no justification for requesting the Court to omit said references. The Board's failure to do so warrants that its petition be denied.

In place of the Court's opinion the Board is requesting

the Court to interpret the Board's rule and regulation which specifies when and under what circumstances the General Counsel may amend or seek to amend his complaint.[1] This issue was not before the Court in this case because, as the Court has already observed, ". . . the General Counsel took no initiative of any kind [to amend the complaint]" (Sl. op. p. 3, n. 3). Therefore, it is clearly improper to request the Court to rule on an issue not before it and not litigated.

Indeed, the right of the General Counsel to amend the complaint "unilaterally" before the hearing opens, as the Board now requests the Court to find (Bd. Brief, p. 2), is not an accurate statement of the law. It has been held that the General Counsel cannot enter into settlement after issuance of complaint, and based thereon withdraw the complaint, without first affording to the charging party a right to be heard, *Leeds & Northrup Company* v. *N. L. R. B.*, 357 F. 2d 527, 531-533 (C. A. 3, 1966);[2] *Textile Workers of America, AFL-CIO* v. *N. L. R. B.*, 294 F. 2d 738, 739-741 (C. A. D. C., 1961); *Marine Engineer's Beneficial Association No. 13* v. *N. L. R. B.*, 202 F. 2d 546 (C. A. 3, 1953), cert. denied 346 U. S. 819, 74 S. Ct. 32. If the General Counsel's right to withdraw a complaint in its entirety upon a settlement may be conditioned upon the charging

1. 29 C. F. R. § 102.17.

2. In the *Leeds & Northrup* case, at p. 533, the Court said:

> Clearly once a complaint issues the statutory scheme contemplates Board action. Anything else such as informal actions of its agents in dismissing such complaint over the objections of the charging party, is arbitrary and capricious.

Here the Court has noted Board counsel's remarks in oral argument that for an amendment of any substance to be sought, the General Counsel must obtain prior Board approval.

party's right to be heard, *a fortiori* his right to amend a complaint before hearing is similarly proscribed.[3] Thus, the modification sought by the Board that the General Counsel may "unilaterally amend a complaint" is not accurate.

The Board's petition has arrogantly asserted that its proposed modification "accurately reflects the actual practice under the Board's rules and regulations" (Bd. Brief, p. 2). In this case the Court was presented with the detailed facts of an actual case of Board malpractice which prompted the Court to remark that the General Counsel's conduct "generated unnecessary confusion and controversy" (Sl. op. p. 3). To now ask the Court to modify its decision to reflect a practice other than that which appeared in the instant matter is improper and unwarranted.

Upon the foregoing, it is respectfully requested that the Court deny the Board's petition for modification of opinion.

Respectfully submitted,

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3. The Board's Rules and Regulations (29 C. F. R. § 102.17) so provide by conditioning amendments ". . . upon such terms as may be deemed just . . ."